

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.	Date Filed
3-RC-265905	September 11, 2020

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer Medaille College	2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code) 18 Agassiz Circle NY Buffalo 14214-
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3a. Employer Representative - Name and Title Kenneth Macur	3b. Address (if same as 2b - state same) 18 Agassiz Circle NY Buffalo 14214-
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3c. Tel. No.	3d. Cell No.	3e. Fax No.	3f. E-Mail Address Kenneth.M.Macur@medaille.edu
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4a. Type of Establishment (Factory, mine, wholesaler, etc.) Schools	4b. Principal product or service High Education	5a. City and State where unit is located: Buffalo, NY
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5b. Description of Unit Involved Included: See Attached Page 2 for additional details Excluded: See Attached Page 2 for additional details	6a. No. of Employees in Unit: 72 6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>
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Check One: ☒ 7a. Request for recognition as Bargaining Representative was made on (Date) 09/09/2020 and Employer declined recognition on or about (Date) (If no reply received, so state). Yes
☐ 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (if none, so state).	8b. Address
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8c. Tel No.	8d. Cell No.	8e. Fax No.	8f. E-Mail Address
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8g. Affiliation, if any	8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)
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9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? (Name of labor organization) has picketed the Employer since (Month, Day, Year)

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11b. Election Date(s): September 29 & 30	11c. Election Time(s): 7am-7pm	11a. Election Type: <input type="checkbox"/> Manual <input type="checkbox"/> Mail <input checked="" type="checkbox"/> Mixed Manual/Mail
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11d. Election Location(s): Medaille College Buffalo Campus, Medaille College Rochester Campus	12b. Address (street and number, city, state, and ZIP code) 1 West Oak Hill Rd NY Jamestown 14701-
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12a. Full Name of Petitioner (including local name and number)
John M. Lichtenthal
Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state) NYSUT/AFT/NEA/AFL-CIO	12d. Tel No. (716) 664-7425	12e. Cell No. (716) 704-8803	12f. Fax No.	12g. E-Mail Address John.Lichtenthal@nysut.org
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13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title Claire T. Sellers NYSUT Associate Counsel NYSUT	13b. Address (street and number, city, state, and ZIP code) 271 Porter Ave NY Buffalo 14201-
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13c. Tel No. (716) 304-0550	13d. Cell No. (716) 609-9988	13e. Fax No.	13f. E-Mail Address claire.sellers@nysut.org
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I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) John M. Lichtenthal	Signature John Lichtenthal	Title Labor Relations Specialist	Date 09/10/2020 09:52:21
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WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Attachment

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
3-RC-265905	September 11, 2020

Employees Included

Assistant professor, Associate professor, Clinical Associate professor, Clinical Assistant Professor, Librarian, Assistant Professor of the Practice, Associate Professor of the Practice, all academic Directors (e.g., Program Director, Co-Director, Clinical Program Director, Honors Program director etc.), Professor, Professor of Practice, Clinical Instructor.

Employees Excluded

All employees not specified

CERTIFICATE OF SERVICE

Employer Name: Medaille College

Service on the Employer

I hereby certify that on 9/10/2020 (date), a copy of the petition involving the Employer named above, a Statement of Position (Form NLRB-505), and a Description of Procedures (Form NLRB-4812) were served on the Employer by: (check whichever is applicable)

- ☐ e-mail to the email address shown on the petition.
- ☐ facsimile (with the permission of the Employer) to the facsimile number shown on the petition.
- ☐ overnight mail to the mailing address shown on the petition.
- ☒ hand-delivery to Michelle Kreib, Secretary to the President (name of Employer's representative) at the following address: 18 Agassiz Circle, Medaille College, Office of The President, Buffalo, NY 14214

Service on the Other Party Named in the Petition

I hereby certify that on _____ (date), a copy of the petition involving the Employer named above, a Statement of Position (Form NLRB-505), and a Description of Procedures (Form NLRB-4812) were also served on _____ (name of party or parties) by: (check whichever is applicable)

- ☐ email to the email address shown on the petition.
- ☐ facsimile (with the permission of the party) to the facsimile number shown on the petition.
- ☐ overnight mail to the mailing address shown on the petition.
- ☐ hand-delivery to _____ (name of party's representative) at the following address: _____.

Service on the Other Party Named in the Petition

I hereby certify that on _____ (date), a copy of the petition involving the Employer named above, a Statement of Position (Form NLRB-505), and a Description of Procedures (Form NLRB-4812) were also served on _____ (name of party or parties) by: (check whichever is applicable)

- ☐ email to the email address shown on the petition.
- ☐ facsimile (with the permission of the party) to the facsimile number shown on the petition.
- ☐ overnight mail to the mailing address shown on the petition.
- ☐ hand-delivery to _____ (name of party's representative) at the following address: _____.

John Lichtenthal
Signature

John Lichtenthal, Labor Relations Specialist
Name and Title

9/10/2020
Date



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 3
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Agency Website: www.nlr.gov
Telephone: (716)551-4931
Fax: (716)551-4972



Download
NLRB
Mobile App

September 11, 2020

URGENT

John M. Lichtenthal, Labor Relations Specialist
Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO
1 West Oak Hill Rd
Jamestown, NY 14701

Re: Medaille College
Case 03-RC-265905

Dear Mr. Lichtenthal:

The enclosed petition that you filed with the National Labor Relations Board (NLRB) has been assigned the above case number. This letter tells you how to contact the Board agent who will be handling this matter; explains your obligation to provide the originals of the showing of interest and the requirement that you complete and serve a Responsive Statement of Position form in response to each timely filed and served Statement(s) of Position; notifies you of a hearing; describes the employer's obligation to post and distribute a Notice of Petition for Election, complete a Statement of Position and provide a voter list; requests that you provide certain information; notifies you of your right to be represented; and discusses some of our procedures including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Examiner Patricia E. Petock whose telephone number is (716)398-7023. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. The Board agent may also contact you and the other party or parties to schedule a conference meeting or telephonic or video conference for some time before the close of business the day following receipt of the final Responsive Statement(s) of Position. This will give the parties sufficient time to determine if any issues can be resolved prior to hearing or if a hearing is necessary. If the agent is not available, you may contact Acting Assistant to the Regional Director Sandra L. Larkin whose telephone number is (716)398-7016. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Showing of Interest: If the Showing of Interest you provided in support of your petition was submitted electronically or by fax, the original documents which constitute the Showing of Interest containing handwritten signatures must be delivered to the Regional office within **2 business days**. If the originals are not received within that time the Region will dismiss your petition.

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **10:00 AM on Thursday, October 1, 2020** via a Zoom conference call, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, we will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party showing good cause, the regional director may postpone the hearing. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Posting and Distribution of Notice: The Employer must post the enclosed Notice of Petition for Election by September 18, 2020 in conspicuous places, including all places where notices to employees are customarily posted. If it customarily communicates electronically with its employees in the petitioned-for unit, it must also distribute the notice electronically to them. The Employer must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Failure to post or distribute the notice may be grounds for setting aside the election if proper and timely objections are filed.

Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the Employer is required to complete the enclosed Statement of Position form, have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition by **noon Eastern Time** on September 23, 2020. The Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the Employer contends that the proposed unit is inappropriate, it must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The Employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.

Required Responsive Statement of Position (RSOP): In accordance with Section 102.63(b) of the Board's Rules, following timely filing and service of a Statement of Position, the petitioner is required to complete the enclosed Responsive Statement of Position form addressing issues raised in any Statement(s) of Position. The petitioner must file a complete, signed RSOP in response to all other parties' timely filed and served Statement of Position, with all required attachments, with this office and serve it on all parties named in the petition such that it is received by them by **noon Eastern Time** on September 28, 2020. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will not be timely if filed on the due date but after noon Eastern Time.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

Failure to Supply Information: Failure to supply the information requested by the RSOP form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Voter List: If an election is held in this matter, the Employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names and addresses of all eligible voters, including their shifts, job classifications, work locations, and other contact information including available personal email addresses and available personal home and cellular telephone numbers. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. The list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the Employer must file the voter list with the Regional Office. However, a petitioner and/or union entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483, which is available on the NLRB's website or from an NLRB office. A waiver will not be effective unless all parties who are entitled to the voter list agree to waive the same number of days.

Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

- (a) The correct name of the Union as stated in its constitution or bylaws.
- (b) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any employees in the petitioned-for unit.
- (c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.
- (d) The name and contact information for any other labor organization (union) claiming to represent or have an interest in any of the employees in the petitioned-for unit and for any employer who may be a joint employer of the employees in the proposed unit. Failure to disclose the existence of an interested party may delay the processing of the petition.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before the NLRB. In view of our policy of processing these cases expeditiously, if you wish to be represented, you should obtain representation promptly. Your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlr.gov, or from an NLRB office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any “inside knowledge” or favored relationship with the NLRB. Their knowledge regarding this matter was obtained only through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Pursuant to Section 102.5 of the Board’s Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency’s web site (www.nlr.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determinations solely based on the documents and evidence properly submitted. All evidence submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

Information about the NLRB and our customer service standards is available on our website, www.nlr.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Paul J. Murphy". The signature is fluid and cursive, with the first name "Paul" and last name "Murphy" clearly distinguishable.

PAUL J. MURPHY
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)
6. Responsive Statement of Position (Form 506)

cc: Claire T. Sellers, NYSUT Associate
Counsel
NYSUT
271 Porter Ave
Buffalo, NY 14201



National Labor Relations Board



NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 03-RC-265905 seeking an election to become certified as the representative of the employees of Medaille College in the unit set forth below:

Included: Assistant professor, Associate professor, Clinical Associate professor, Clinical Assistant Professor, Librarian, Assistant Professor of the Practice, Associate Professor of the Practice, all academic Directors (e.g., Program Director, Co-Director, Clinical Program Director, Honors Program director etc.), Professor, Professor of Practice, Clinical Instructor. Excluded: All employees not specified

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

YOU HAVE THE RIGHT under Federal Law

- To self-organization
- To form, join, or assist labor organizations
- To bargain collectively through representatives of your own choosing
- To act together for the purposes of collective bargaining or other mutual aid or protection
- To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).

PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. **NO FINAL DECISIONS HAVE BEEN MADE YET** regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

IF AN ELECTION IS HELD, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- Threatening loss of jobs or benefits by an employer or a union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or, if the election is conducted by mail, from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return
- Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a union or an employer to influence their votes

Please be assured that IF AN ELECTION IS HELD, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to www.nlr.gov or contact the NLRB at (716)551-4931.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.



National Labor Relations Board





**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**



Medaille College Employer and Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO Petitioner	Case 03-RC-265905
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NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 10:00 AM on **Thursday, October 1, 2020** and on consecutive days thereafter until concluded, a hearing will be conducted before a hearing officer of the National Labor Relations Board via a Zoom conference call. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Medaille College must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Eastern time on September 23, 2020. Following timely filing and service of a Statement of Position by Medaille College, Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO must complete its Responsive Statement of Position responding to the issues raised in the Employer's Statement of Position and file it and all attachments with the Regional Director and serve it on the parties named in the petition such that it is received by them no later than **noon** Eastern on September 28, 2020.

Pursuant to Section 102.5 of the Board's Rules and Regulations, all documents filed in cases before the Agency must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing the document does not have access to the means for filing electronically or filing electronically would impose an undue burden. Documents filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide](#)

The Statement of Position and Responsive Statement of Position must be E-Filed but, unlike other E-Filed documents, must be filed by **noon** Eastern on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position and Responsive Statement of Position are not required to be filed. If an election agreement is signed by all parties and returned to the Regional office after the due date of the Statement of Position but before the due date of the Responsive Statement of Position, the Responsive Statement of Position is not required to be filed.

Dated: September 11, 2020

/s/Paul J. Murphy

PAUL J. MURPHY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Medaille College Employer and Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO Petitioner	Case 03-RC-265905
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AFFIDAVIT OF SERVICE OF: Petition dated September 11, 2020, Notice of Representation Hearing dated September 11, 2020, Description of Procedures in Certification and Decertification Cases (Form NLRB-4812), Notice of Petition for Election, and Statement of Position Form (Form NLRB-505).

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 11, 2020, I served the above documents by electronic mail and regular mail upon the following persons, addressed to them at the following addresses:

Kenneth Macur, President of the College
Medaille College
18 Agassiz Circle
Buffalo, NY 14214-____
kenneth.m.macur@medaille.edu

Claire T. Sellers, NYSUT Associate Counsel
NYSUT
271 Porter Ave
Buffalo, NY 14201-____
claire.sellers@nysut.org

John M. Lichtenthal, Labor Relations
Specialist
Medaille College Faculty
Association/NYSUT/AFT/NEA/AFL-CIO
1 West Oak Hill Rd
Jamestown, NY 14701-____
john.lichtenthal@nysut.org

September 11, 2020
Date

Andrea Seyfried, Designated Agent of NLRB
Name

/s/ Andrea Seyfried
Signature

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

**DESCRIPTION OF REPRESENTATION CASE PROCEDURES
IN CERTIFICATION AND DECERTIFICATION CASES**

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlr.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews both the petition, certificate of service, and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 14 business days (excluding weekends and federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position and the Responsive Statement of Position(s). Included with the Notice of Representation Hearing are the following: (1) a copy of the petition, (2) this form, (3) a Statement of Position for non-petitioning parties, (4) petitioner's Responsive Statement of Position, (5) a Notice of Petition for Election, and (6) a letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: Requests to postpone the hearing are not routinely granted, but the regional director may postpone the hearing for good cause. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request must be filed electronically ("E-Filed") on the Agency's website (www.nlr.gov) by following the instructions on the website. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. As part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. In an **RC** or **RD** case, if the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department).

Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list

must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx)

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon 8 business days from the issuance of the Notice of Hearing. The regional director may postpone the due date for filing and serving the Statement of Position for good cause. The Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion."

A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Responsive Statement of Position – Petitioner's Responsive Statement(s) of Position solicits a response to the Statement(s) of Position filed by the other parties and further facilitates entry into election agreements or streamlines the preelection hearing. A petitioner must file a response to each party's Statement of Position. In the case of an RM petition, the employer-petitioner must also provide commerce information and file and serve a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. Ordinarily, the Responsive Statement of Position must be electronically filed with the Regional Office and served on the other parties such that it is received by noon 3 business days prior to the hearing. The regional director may postpone the due date for filing and serving the Responsive Statement of Position for good cause. The Responsive Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Responsive Statement of Position requirement are discussed on the following page under the heading "Preclusion."

Posting and Distribution of Notice of Petition for Election – Within 5 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically to the employees in the petitioned-for unit if the employer customarily communicates with these employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

Purpose of Hearing: The primary purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a

unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative.

Issues at Hearing: Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; seasonal operation; potential mixed guard/non-guard unit; and eligibility formulas. At the hearing, the timely filed Statement of Position and Responsive Statement of Position(s) will be received into evidence. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

Preclusion: At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or Responsive Statement of Position(s) or to place in dispute in response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Conduct of Hearing: If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

Official Record: An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made at the hearing in the hearing room will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

Motions and Objections: All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

Election Details: Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

Oral Argument and Briefs: Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be due within 5 business days of the close of the hearing. The hearing officer may allow up to 10 additional business days for such briefs prior to the close of hearing and for good cause. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. Briefs must be e-filed through the Board's website, www.nlr.gov.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 10 business days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefore.

Voter List – The employer must provide to the regional director and the parties named in the election agreement or direction of election a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge.

The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction.

To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction of election unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 calendar days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A STATEMENT OF POSITION FORM

Completing and Filing this Form: The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You may E-File your Statement of Position at www.nlrb.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

Note: *Non-employer parties who complete this Statement of Position are NOT required to complete items 8f and 8g of the form, or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to complete items 3, 5, 6, and 8a-8e of the form.*

Required Lists: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx).

Consequences of Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE

Case No. 03-RC-265905	Date Filed September 11, 2020
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INSTRUCTIONS: Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.

Note: Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.

1a. Full name of party filing Statement of Position		1c. Business Phone:	1e. Fax No.:
1b. Address (Street and number, city, state, and ZIP code)		1d. Cell No.:	1f. e-Mail Address
2. Do you agree that the NLRB has jurisdiction over the Employer in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No (A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)			
3. Do you agree that the proposed unit is appropriate? <input type="checkbox"/> Yes <input type="checkbox"/> No (If not, answer 3a and 3b)			
a. State the basis for your contention that the proposed unit is not appropriate. (If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards)			
b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.			
Added		Excluded	
4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.			
5. Is there a bar to conducting an election in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, state the basis for your position.			
6. Describe all other issues you intend to raise at the pre-election hearing.			
The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx . A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be excluded from the proposed unit to make it an appropriate unit. (Attachment D)			
State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: <input type="checkbox"/> Manual <input type="checkbox"/> Mail <input type="checkbox"/> Mixed Manual/Mail			
8b. Date(s)	8c. Time(s)	8d. Location(s)	
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period <input type="checkbox"/> Weekly <input type="checkbox"/> Biweekly <input type="checkbox"/> Other (specify length)	
9. Representative who will accept service of all papers for purposes of the representation proceeding			
9a. Full name and title of authorized representative		9b. Signature of authorized representative	9c. Date
9d. Address (Street and number, city, state, and ZIP code)			9e. e-Mail Address
9f. Business Phone No.:		9g. Fax No.	9h. Cell No.

WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME

CASE NUMBER

03-RC-265905

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)**2. TYPE OF ENTITY**☐ CORPORATION ☐ LLC ☐ LLP ☐ PARTNERSHIP ☐ SOLE PROPRIETORSHIP ☐ OTHER (Specify)**3. IF A CORPORATION or LLC**A. STATE OF INCORPORATION
OR FORMATION

B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS**5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR****6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS (Products handled or manufactured, or nature of services performed).****7. A. PRINCIPAL LOCATION:****B. BRANCH LOCATIONS:****8. NUMBER OF PEOPLE PRESENTLY EMPLOYED**

A. Total:

B. At the address involved in this matter:

9. DURING THE MOST RECENT (Check appropriate box): ☐ CALENDAR YR ☐ 12 MONTHS or ☐ FISCAL YR (FY dates)

YES NO

A. Did you **provide services** valued in excess of \$50,000 directly to customers outside your State? If no, indicate actual value.
\$B. If you answered no to 9A, did you **provide services** valued in excess of \$50,000 to customers in your State who purchased goods valued in excess of \$50,000 from directly outside your State? If no, indicate the value of any such services you provided.
\$C. If you answered no to 9A and 9B, did you **provide services** valued in excess of \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than \$50,000, indicate amount. \$D. Did you **sell goods** valued in excess of \$50,000 directly to customers located outside your State? If less than \$50,000, indicate amount. \$E. If you answered no to 9D, did you **sell goods** valued in excess of \$50,000 directly to customers located inside your State who purchased other goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount.
\$F. Did you **purchase and receive goods** valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$G. Did you **purchase and receive goods** valued in excess of \$50,000 from enterprises who received the goods directly from points outside your State? If less than \$50,000, indicate amount. \$H. **Gross Revenues** from all sales or performance of services (Check the largest amount)
☐ \$100,000 ☐ \$250,000 ☐ \$500,000 ☐ \$1,000,000 or more If less than \$100,000, indicate amount.I. Did you **begin operations within the last 12 months**? If yes, specify date: _____**10 ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?**☐ YES ☐ NO (If yes, name and address of association or group).**11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS**

NAME

TITLE

E-MAIL ADDRESS

TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE (Type or Print)

SIGNATURE

E-MAIL ADDRESS

DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A RESPONSIVE STATEMENT OF POSITION FORM

Completing and Filing this Form: For **RC and RD petitions**, the Petitioner is required to complete this form in response to each timely filed and served Statement of Position filed by another party. For **RM petitions**, the Employer-Petitioner must complete a Responsive Statement of Position form and submit the lists described below. In accordance with Section 102.63(b) of the Board's Rules, if you are required to complete the form, you must have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in another party's Statement of Position, such that it is received no later than noon three business days before the date of the hearing. A separate form must be completed for each timely filed and properly served Statement of Position you receive. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You should E-File your Statement of Position at www.NLRB.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed. Note that if you are completing this form as a PDF downloaded from www.NLRB.gov, the form will lock upon signature and no further editing may be made.**

Required Lists: In addition to filing a Responsive Statement of Position to another party's Statement of Position, the Employer-Petitioner in an RM case is required to file and serve on the parties a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional_Forms_for_Voter_List.docx

Consequences of Failure to Submit a Responsive Statement of Position: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RESPONSIVE STATEMENT OF POSITION - RC OR RD PETITION

DO NOT WRITE IN THIS SPACE

Case No.
03-RC-265905

Date Filed
September 11, 2020

INSTRUCTIONS: If a party has submitted and served on you a timely Statement of Position to an RC or RD petition, the Petitioner must submit this Responsive Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and any attachments on each party named in the petition in this case such that it is received by noon local time, three business days prior to the hearing date specified in the Notice of Hearing. A separate form must be completed for each timely filed and properly served Statement of Position received by the Petitioner.

This Responsive Statement of Position is filed by the Petitioner in response to a Statement of Position received from the following party:

Medaille College

1a. Full Name of Party Filing Responsive Statement of Position

1c. Business Phone

1e. Fax No.

1d. Cell No.

1f. E-Mail Address

1b. Address (Street and Number, City, State, and ZIP Code)

2. Identify all issues raised in the other party's Statement of Position that you dispute and describe the basis of your dispute:

a. EMPLOYER NAME/IDENTITY [Box 1a of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

b. JURISDICTION [Box 2 of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

c. APPROPRIATENESS OF UNIT [Boxes 3, 3a and 3b of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

d. INDIVIDUAL ELIGIBILITY [Box 4 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

e. BARS TO ELECTION [Box 5 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

f. ALL OTHER ISSUES [Box 6 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

g. ELECTION DETAILS [Boxes 8a, 8b, 8c, 8d, 8e, 8f, and 8g of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

Full Name and Title of Authorized Representative

Signature of Authorized Representative

Date

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Please fill all necessary fields on the form PRIOR to digitally signing. To make changes after the form has been signed, right-click on the signature field and click "clear signature." Once complete, please sign the form.



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 3
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

Agency Website: www.nlr.gov
Telephone: (716)551-4931
Fax: (716)551-4972



Download
NLRB
Mobile App

September 11, 2020

URGENT

Kenneth Macur, President of the College
Medaille College
18 Agassiz Circle
Buffalo, NY 14214-____

Re: Medaille College
Case 03-RC-265905

Dear Dr. Macur:

Enclosed is a copy of a petition that Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO filed with the National Labor Relations Board (NLRB) seeking to represent certain of your employees. After a petition is filed, the employer is required to promptly take certain actions so please read this letter carefully to make sure you are aware of the employer's obligations. This letter tells you how to contact the Board agent who will be handling this matter, about the requirement to post and distribute the Notice of Petition for Election, the requirement to complete and serve a Statement of Position Form, the Petitioner's requirement to complete and serve a Responsive Statement of Position Form, a scheduled hearing in this matter, other information needed including a voter list, your right to be represented, and NLRB procedures, including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Examiner Patricia E. Petock whose telephone number is (716)398-7023. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. If the agent is not available, you may contact Acting Assistant to the Regional Director Sandra L. Larkin whose telephone number is (716)398-7016. The Board agent may also contact you and the other party or parties to schedule a conference meeting or telephonic or video conference for some time before the close of business the day following receipt of the final Responsive Statement(s) of Position. This will give the parties sufficient time to determine if any issues can be resolved prior to hearing or if a hearing is necessary. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Required Posting and Distribution of Notice: You must post the enclosed Notice of Petition for Election by September 18, 2020 in conspicuous places, including all places where notices to employees are customarily posted. The Notice of Petition for Election must be posted so all pages are simultaneously visible. If you customarily communicate electronically with employees in the petitioned-for unit, you must also distribute the notice electronically to them. You must maintain the posting until the petition is dismissed or withdrawn or this notice is

replaced by the Notice of Election. Posting and distribution of the Notice of Petition for Election will inform the employees whose representation is at issue and the employer of their rights and obligations under the National Labor Relations Act in the representation context. Failure to post or distribute the notice may be grounds for setting aside an election if proper and timely objections are filed.

Required Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the employer is required to complete the enclosed Statement of Position form (including the attached Commerce Questionnaire), have it signed by an authorized representative, and file a completed copy (with all required attachments) with this office and serve it on all parties named in the petition such that it is received by them by **noon Eastern Time** on September 23, 2020. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will *not* be timely if filed on the due date but after noon Eastern Time.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

List(s) of Employees: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx)

Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a

voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Responsive Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, following timely filing and service of an employer's Statement of Position, the petitioner is required to complete the enclosed Responsive Statement of Position form, have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in the employer's Statement of Position, such that it is received no later than **noon Eastern Time** on September 28, 2020.

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **10:00 a.m. on Thursday, October 1, 2020** via a Zoom conference call, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, the NLRB will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party showing good cause, the regional director may postpone the hearing. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Other Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

- (a) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any of your employees in the unit involved in the petition (the petitioned-for unit);

- (b) The name and contact information for any other labor organization (union) claiming to represent any of the employees in the petitioned-for unit;
- (c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.
- (d) If you desire a formal check of the showing of interest, you must provide an alphabetized payroll list of employees in the petitioned-for unit, with their job classifications, for the payroll period immediately before the date of this petition. Such a payroll list should be submitted as early as possible prior to the hearing. Ordinarily a formal check of the showing of interest is not performed using the employee list submitted as part of the Statement of Position.

Voter List: If an election is held in this matter, the employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of eligible voters. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. I am advising you of this requirement now, so that you will have ample time to prepare this list. The list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlr.gov, or at the Regional office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any “inside knowledge” or favored relationship with the NLRB. Their knowledge regarding this matter was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Pursuant to Section 102.5 of the Board’s Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency’s web site (www.nlr.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determinations solely based on the documents and evidence properly submitted. All evidence submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native

format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

Information about the NLRB and our customer service standards is available on our website, www.nlr.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Paul J. Murphy".

PAUL J. MURPHY
Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)
6. Responsive Statement of Position (Form 506)



National Labor Relations Board



NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 03-RC-265905 seeking an election to become certified as the representative of the employees of Medaille College in the unit set forth below:

Included: Assistant professor, Associate professor, Clinical Associate professor, Clinical Assistant Professor, Librarian, Assistant Professor of the Practice, Associate Professor of the Practice, all academic Directors (e.g., Program Director, Co-Director, Clinical Program Director, Honors Program director etc.), Professor, Professor of Practice, Clinical Instructor. Excluded: All employees not specified

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

YOU HAVE THE RIGHT under Federal Law

- To self-organization
- To form, join, or assist labor organizations
- To bargain collectively through representatives of your own choosing
- To act together for the purposes of collective bargaining or other mutual aid or protection
- To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).

PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. **NO FINAL DECISIONS HAVE BEEN MADE YET** regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

IF AN ELECTION IS HELD, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- Threatening loss of jobs or benefits by an employer or a union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or, if the election is conducted by mail, from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return
- Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a union or an employer to influence their votes

Please be assured that IF AN ELECTION IS HELD, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to www.nlr.gov or contact the NLRB at (716)551-4931.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.



National Labor Relations Board





**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3**



Medaille College Employer and Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO Petitioner	Case 03-RC-265905
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NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 10:00 AM on **Thursday, October 1, 2020** and on consecutive days thereafter until concluded, at the National Labor Relations Board offices via a Zoom conference call, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Medaille College must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that it is received by them by no later than **noon** Eastern time on **September 23, 2020**. Following timely filing and service of a Statement of Position by Medaille College, Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO must complete its Responsive Statement of Position responding to the issues raised in the Employer's Statement of Position and file it and all attachments with the Regional Director and serve it on the parties named in the petition such that it is received by them no later than **noon** Eastern on September 28, 2020.

Pursuant to Section 102.5 of the Board's Rules and Regulations, all documents filed in cases before the Agency must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing the document does not have access to the means for filing electronically or filing electronically would impose an undue burden. Documents filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide](#)

The Statement of Position and Responsive Statement of Position must be E-Filed but, unlike other E-Filed documents, must be filed by **noon** Eastern on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position and Responsive Statement of Position are not required to be filed. If an election agreement is signed by all parties and returned to the Regional office after the due date of the Statement of Position but before the due date of the Responsive Statement of Position, the Responsive Statement of Position is not required to be filed.

Dated: September 11, 2020

PAUL J. MURPHY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 3
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Medaille College Employer and Medaille College Faculty Association/NYSUT/AFT/NEA/AFL-CIO Petitioner	Case 03-RC-265905
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AFFIDAVIT OF SERVICE OF: Petition dated September 11, 2020, Notice of Representation Hearing dated September 11, 2020, Description of Procedures in Certification and Decertification Cases (Form NLRB-4812), Notice of Petition for Election, and Statement of Position Form (Form NLRB-505).

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 11, 2020, I served the above documents by electronic mail and regular mail upon the following persons, addressed to them at the following addresses:

Kenneth Macur, President of the College
Medaille College
18 Agassiz Circle
Buffalo, NY 14214-____
kenneth.m.macur@medaille.edu

Claire T. Sellers, NYSUT Associate Counsel
NYSUT
271 Porter Ave
Buffalo, NY 14201-____
claire.sellers@nysut.org

John M. Lichtenthal, Labor Relations
Specialist
Medaille College Faculty
Association/NYSUT/AFT/NEA/AFL-CIO
1 West Oak Hill Rd
Jamestown, NY 14701-____
john.lichtenthal@nysut.org

September 11, 2020

Date

Andrea Seyfried, Designated Agent of NLRB

Name

/s/ Andrea Seyfried

Signature

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

**DESCRIPTION OF REPRESENTATION CASE PROCEDURES
IN CERTIFICATION AND DECERTIFICATION CASES**

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlr.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews both the petition, certificate of service, and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 14 business days (excluding weekends and federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position and the Responsive Statement of Position(s). Included with the Notice of Representation Hearing are the following: (1) a copy of the petition, (2) this form, (3) a Statement of Position for non-petitioning parties, (4) petitioner's Responsive Statement of Position, (5) a Notice of Petition for Election, and (6) a letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: Requests to postpone the hearing are not routinely granted, but the regional director may postpone the hearing for good cause. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request must be filed electronically ("E-Filed") on the Agency's website (www.nlr.gov) by following the instructions on the website. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. As part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. In an **RC** or **RD** case, if the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department).

Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list

must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx)

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon 8 business days from the issuance of the Notice of Hearing. The regional director may postpone the due date for filing and serving the Statement of Position for good cause. The Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion."

A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Responsive Statement of Position – Petitioner's Responsive Statement(s) of Position solicits a response to the Statement(s) of Position filed by the other parties and further facilitates entry into election agreements or streamlines the preelection hearing. A petitioner must file a response to each party's Statement of Position. In the case of an RM petition, the employer-petitioner must also provide commerce information and file and serve a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. Ordinarily, the Responsive Statement of Position must be electronically filed with the Regional Office and served on the other parties such that it is received by noon 3 business days prior to the hearing. The regional director may postpone the due date for filing and serving the Responsive Statement of Position for good cause. The Responsive Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Responsive Statement of Position requirement are discussed on the following page under the heading "Preclusion."

Posting and Distribution of Notice of Petition for Election – Within 5 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically to the employees in the petitioned-for unit if the employer customarily communicates with these employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

Purpose of Hearing: The primary purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a

unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative.

Issues at Hearing: Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; seasonal operation; potential mixed guard/non-guard unit; and eligibility formulas. At the hearing, the timely filed Statement of Position and Responsive Statement of Position(s) will be received into evidence. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

Preclusion: At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or Responsive Statement of Position(s) or to place in dispute in response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Conduct of Hearing: If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

Official Record: An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made at the hearing in the hearing room will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

Motions and Objections: All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

Election Details: Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

Oral Argument and Briefs: Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be due within 5 business days of the close of the hearing. The hearing officer may allow up to 10 additional business days for such briefs prior to the close of hearing and for good cause. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. Briefs must be e-filed through the Board's website, www.nlr.gov.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 10 business days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefore.

Voter List – The employer must provide to the regional director and the parties named in the election agreement or direction of election a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge.

The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction.

To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction of election unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 calendar days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A STATEMENT OF POSITION FORM

Completing and Filing this Form: The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You may E-File your Statement of Position at www.nlrb.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

Note: *Non-employer parties who complete this Statement of Position are NOT required to complete items 8f and 8g of the form, or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to complete items 3, 5, 6, and 8a-8e of the form.*

Required Lists: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx).

Consequences of Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE

Case No. 03-RC-265905	Date Filed September 11, 2020
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INSTRUCTIONS: Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.

Note: Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7. In RM cases, the employer is NOT required to respond to items 3, 5, 6, and 8a-8e below.

1a. Full name of party filing Statement of Position		1c. Business Phone:	1e. Fax No.:
1b. Address (Street and number, city, state, and ZIP code)		1d. Cell No.:	1f. e-Mail Address
2. Do you agree that the NLRB has jurisdiction over the Employer in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No (A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)			
3. Do you agree that the proposed unit is appropriate? <input type="checkbox"/> Yes <input type="checkbox"/> No (If not, answer 3a and 3b)			
a. State the basis for your contention that the proposed unit is not appropriate. (If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards)			
b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.			
Added		Excluded	
4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.			
5. Is there a bar to conducting an election in this case? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, state the basis for your position.			
6. Describe all other issues you intend to raise at the pre-election hearing.			
The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx . A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be excluded from the proposed unit to make it an appropriate unit. (Attachment D)			
State your position with respect to the details of any election that may be conducted in this matter. 8a. Type: <input type="checkbox"/> Manual <input type="checkbox"/> Mail <input type="checkbox"/> Mixed Manual/Mail			
8b. Date(s)	8c. Time(s)	8d. Location(s)	
8e. Eligibility Period (e.g. special eligibility formula)	8f. Last Payroll Period Ending Date	8g. Length of payroll period <input type="checkbox"/> Weekly <input type="checkbox"/> Biweekly <input type="checkbox"/> Other (specify length)	
9. Representative who will accept service of all papers for purposes of the representation proceeding			
9a. Full name and title of authorized representative		9b. Signature of authorized representative	9c. Date
9d. Address (Street and number, city, state, and ZIP code)			9e. e-Mail Address
9f. Business Phone No.:		9g. Fax No.	9h. Cell No.

WILLFUL FALSE STATEMENTS ON THIS STATEMENT OF POSITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME

CASE NUMBER

03-RC-265905

1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)**2. TYPE OF ENTITY**☐ CORPORATION ☐ LLC ☐ LLP ☐ PARTNERSHIP ☐ SOLE PROPRIETORSHIP ☐ OTHER (Specify)**3. IF A CORPORATION or LLC**A. STATE OF INCORPORATION
OR FORMATION

B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES

4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS**5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR****6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS (Products handled or manufactured, or nature of services performed).****7. A. PRINCIPAL LOCATION:****B. BRANCH LOCATIONS:****8. NUMBER OF PEOPLE PRESENTLY EMPLOYED**

A. Total:

B. At the address involved in this matter:

9. DURING THE MOST RECENT (Check appropriate box): ☐ CALENDAR YR ☐ 12 MONTHS or ☐ FISCAL YR (FY dates)

YES NO

A. Did you **provide services** valued in excess of \$50,000 directly to customers outside your State? If no, indicate actual value.
\$B. If you answered no to 9A, did you **provide services** valued in excess of \$50,000 to customers in your State who purchased goods valued in excess of \$50,000 from directly outside your State? If no, indicate the value of any such services you provided.
\$C. If you answered no to 9A and 9B, did you **provide services** valued in excess of \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than \$50,000, indicate amount. \$D. Did you **sell goods** valued in excess of \$50,000 directly to customers located outside your State? If less than \$50,000, indicate amount. \$E. If you answered no to 9D, did you **sell goods** valued in excess of \$50,000 directly to customers located inside your State who purchased other goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount.
\$F. Did you **purchase and receive goods** valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$G. Did you **purchase and receive goods** valued in excess of \$50,000 from enterprises who received the goods directly from points outside your State? If less than \$50,000, indicate amount. \$H. **Gross Revenues** from all sales or performance of services (Check the largest amount)
☐ \$100,000 ☐ \$250,000 ☐ \$500,000 ☐ \$1,000,000 or more If less than \$100,000, indicate amount.I. Did you **begin operations within the last 12 months?** If yes, specify date: _____**10 ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?**☐ YES ☐ NO (If yes, name and address of association or group).**11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS**

NAME

TITLE

E-MAIL ADDRESS

TEL. NUMBER

12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE (Type or Print)

SIGNATURE

E-MAIL ADDRESS

DATE

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A RESPONSIVE STATEMENT OF POSITION FORM

Completing and Filing this Form: For **RC and RD petitions**, the Petitioner is required to complete this form in response to each timely filed and served Statement of Position filed by another party. For **RM petitions**, the Employer-Petitioner must complete a Responsive Statement of Position form and submit the lists described below. In accordance with Section 102.63(b) of the Board's Rules, if you are required to complete the form, you must have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in another party's Statement of Position, such that it is received no later than noon three business days before the date of the hearing. A separate form must be completed for each timely filed and properly served Statement of Position you receive. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You should E-File your Statement of Position at www.NLRB.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed. Note that if you are completing this form as a PDF downloaded from www.NLRB.gov, the form will lock upon signature and no further editing may be made.**

Required Lists: In addition to filing a Responsive Statement of Position to another party's Statement of Position, the Employer-Petitioner in an RM case is required to file and serve on the parties a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional_Forms_for_Voter_List.docx

Consequences of Failure to Submit a Responsive Statement of Position: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RESPONSIVE STATEMENT OF POSITION - RC OR RD PETITION

DO NOT WRITE IN THIS SPACE

Case No.
03-RC-265905

Date Filed
September 11, 2020

INSTRUCTIONS: If a party has submitted and served on you a timely Statement of Position to an RC or RD petition, the Petitioner must submit this Responsive Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and any attachments on each party named in the petition in this case such that it is received by noon local time, three business days prior to the hearing date specified in the Notice of Hearing. A separate form must be completed for each timely filed and properly served Statement of Position received by the Petitioner.

This Responsive Statement of Position is filed by the Petitioner in response to a Statement of Position received from the following party:

Medaille College

1a. Full Name of Party Filing Responsive Statement of Position

1c. Business Phone

1e. Fax No.

1d. Cell No.

1f. E-Mail Address

1b. Address (Street and Number, City, State, and ZIP Code)

2. Identify all issues raised in the other party's Statement of Position that you dispute and describe the basis of your dispute:

a. EMPLOYER NAME/IDENTITY [Box 1a of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

b. JURISDICTION [Box 2 of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

c. APPROPRIATENESS OF UNIT [Boxes 3, 3a and 3b of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

d. INDIVIDUAL ELIGIBILITY [Box 4 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

e. BARS TO ELECTION [Box 5 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

f. ALL OTHER ISSUES [Box 6 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

g. ELECTION DETAILS [Boxes 8a, 8b, 8c, 8d, 8e, 8f, and 8g of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

Full Name and Title of Authorized Representative

Signature of Authorized Representative

Date

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Please fill all necessary fields on the form PRIOR to digitally signing. To make changes after the form has been signed, right-click on the signature field and click "clear signature." Once complete, please sign the form.

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Medaille College
and
Medaille College Faculty Association/NYSUT/AFT/NES/ AFL-CIO

CASE 03-RC-265905

☒ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____
The Employer - Medaille College

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ REPRESENTATIVE IS AN ATTORNEY

☒ IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

(REPRESENTATIVE INFORMATION)

NAME: <u>James R. Grasso, Esq.</u>	
MAILING ADDRESS: <u>Phillips Lytle LLP, One Canalside, 125 Main Street, Buffalo, NY 14203</u>	
E-MAIL ADDRESS: <u>jgrasso@phillipslytle.co</u>	
OFFICE TELEPHONE NUMBER: <u>716-847-5422</u>	
CELL PHONE NUMBER: <u>716-481-0277</u>	FAX: <u>716-852-6100</u>
SIGNATURE: <u><i>James R. Grasso</i></u> <small>(Please sign in ink.)</small>	
DATE: <u>8/11/20</u>	

¹ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

National Labor Relations Board
**NOTICE OF DESIGNATION OF ATTORNEY
OR REPRESENTATIVE**

Medaille College

and

Medaille College Faculty Association, etc.

CASE NO.

03-RC-265905

To: Regional Director,

I, Kenneth Macur, President of Medaille College, the undersigned, hereby designate

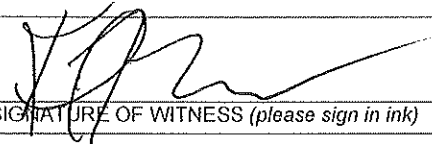
James R. Grasso, whose name and address appear below,

as my attorney/representative in this proceeding.

This designation shall remain valid until a written revocation of it, signed by me, is filed with the Board.

FULL NAME OF WITNESS

Dr. Kenneth M. Macur


SIGNATURE OF WITNESS (please sign in ink)

September 11, 2020

DATE

NAME OF ATTORNEY/REPRESENTATIVE

James R. Grasso

☒ REPRESENTATIVE IS AN ATTORNEY

MAILING ADDRESS

Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, NY 14203

EMAIL ADDRESS

jgrasso@phillipslytle.com

TELEPHONE NUMBER

716-847-5422

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 3

In the Matter of:

MEDAILLE COLLEGE

PETITIONER'S
POST-HEARING BRIEF

Employer,

Case No. 03-RC-265905

and

MEDAILLE COLLEGE FACULTY
ASSOCIATION/NYSUT/AFT/NEA/
AFL-CIO

Petitioner.

PRELIMINARY STATEMENT

Petitioner Medaille College Faculty Association, NYSUT/AFT/NEA/AFL-CIO (“Petitioner” or “Association”) filed an RC Petition with Region 3 of the National Labor Relations board on September 11, 2020. The employer, Medaille College (“Employer,” “Medaille,” or “College”) filed objections to the September 11, 2020 Petition with a Statement of Position on September 23, 2020. A hearing was held before Thomas Miller, Hearing Officer of Region 3 of the National Labor Relations Board on various days from October 1 to October 28, 2020. What follows is the Post-Hearing Brief on behalf of Petitioner and in support of an election being held for the petitioned-for bargaining unit.

STATEMENT OF FACTS

Employer Medaille College (“Medaille” or “College”) is an institution of higher education with locations in Buffalo, New York and Rochester, New York. (Testimony of

Kenneth M. Macur at page 17 of the transcript from the October 1 to October 28, 2020 hearing, hereinafter “Macur at X.”). There are roughly 2,100 students enrolled at both sites. (Macur at 18.) Medaille grants degrees ranging from Associate of Arts degrees to Bachelor and Masters degrees. (Macur at 17-18.)

The current administration at Medaille is headed by President Dr. Kenneth M. Macur, who has been president of the College since about 2015. (Macur at 15.) There is a Board of Trustees which has ultimate fiduciary responsibility and governance, while the President is responsible for the management of the College. (Macur at 20.) the Board of Trustees appoints the President. (Macur at 20.) The current Vice President for Academic Affairs, or VPAA, is Dr. Janel Curry, who has filled that role since about March 2020. (Macur at 705-706; Employer Exhibit 2, hereinafter “ER Exh X”.) Prior to Dr. Curry, Dr. Lori Quigley was the VPAA, from about July of 2016 until March 2020. (Macur at 705.) The current Assistant Vice President for Academic Affairs, or Assistant VPAA, is Michelle Bogdan. (Macur at 380.)

Faculty Handbooks

Prior to April 27, 2020, College governance and policies were published in a Faculty Handbook, which by its own terms, “contains and explains the policies and processes relating to the faculty and faculty status.” (Petitioner Exhibit 1 at page 1, hereinafter “P Exh X at p Y.”). The version of the handbook that was in operation immediately prior to April 27, 2020 was approved by the Board of Trustees in October 2018, and is hereinafter referred to as the “2018 Handbook.” (Macur at 619.)

The 2018 Handbook defined numerous terms of employment for Medaille faculty, including among other things, faculty ranks, appointment policies, evaluation and review procedures, promotion policies, the creation of tenure and policies relating thereto, termination

and layoff, and working conditions such as workload, compensation, and a discrimination and harassment policy. (P Exh 1 at pp 3-68.) The 2018 Handbook also detailed the Medaille policies regarding faculty and academic governance. (P Exh 1 at pp 68-88.) “Faculty governance” is defined in the 2018 Handbook as that which “primarily involves faculty interest in and administration of faculty benefits and compensation, reappointment, evaluation, promotion, and tenure... .” (P Exh 1 at p 68.) “Academic governance” is similarly defined as that which “primarily involves assessment of student outcomes, as well as assessment and administration of academic programs, departments, curricula, and services on a College-wide basis.” (*Ibid.*)

Governance was allegedly shared between the faculty and administration prior to April 27, 2020 primarily through various faculty committees. (P Exh 1 at p 70.) Such committees included the Faculty Assembly, Faculty Council, Promotion and Tenure Committee, Grievance Committee, Hearing Committee, Faculty Compensation Committee (replaced in or about 2017 by the Budget Committee or the Budget and Compensation Committee), Faculty Development Committee, Sabbatical Leave Committee, and the Academic Quality Program Committee or AQPC. (P Exh 1 at p 71; Macur at 135.) The Faculty Assembly is a body of all full-time faculty members. (Macur at 28.) Within the Faculty Assembly, faculty members elect a leadership committee named the Faculty Council. (*Ibid.*) Additional committees were created by the 2018 Handbook, such as the Undergraduate Curriculum Committee or UCC, the Undergraduate Educational Policies Committee or UEPC, the Undergraduate Academic Standards Committee (sometimes known as the Academic Standards Committee), and the Graduate Program Council or GPC. (P Exh 1 at pp 76-82.) The actual operation of such committees, however, differed greatly from the definitions of the 2018 Handbook. See, “Faculty Committees,” *infra*.

The 2018 Handbook was suspended by the College on or about April 27, 2020. (Macur at 620; P Exh 3). The 2018 Handbook had procedures for its own revision and possible temporary suspension. (P Exh 1 at pp 88-90.) In an April 27, 2020 email to faculty notifying them of the suspension of the 2018 Handbook, President Macur cited to such provisions as a basis for suspending the handbook. (P Exh 3; Macur at 680.) In or about April 2020, Dr. Macur engaged in discussions with the Faculty Council regarding possible changes to the 2018 Handbook, which included sharing edited versions of the 2018 Handbook. (Macur at 688; testimony of Daniel Kotzin at pages 1160-61, hereinafter “Kotzin at X,” P Exh 5.) Such discussions were done pursuant to the revision procedures outlined in the 2018 Handbook. (Macur at 688.) Dr. Macur and the Faculty Council were unable to reach an agreement on changes to the 2018 Handbook. (Macur at 689; Kotzin at 1164.) The College did not follow many of the various procedures for the revision of the 2018 Handbook. (*Compare*, Macur at 691 and P Exh 1 at pp 88-89.)

At some point in or about July 2020, the Board of Trustees approved and instated what it held out to be the new faculty handbook, hereinafter the “July 2020 Handbook.” (ER Exh 5; Macur at 81; Kotzin at 1174.) The July 2020 Handbook is intended by the College to be neither temporary nor an interim handbook. (Macur at 618.) The July 2020 Handbook was delivered to the faculty through the Faculty Council and Faculty Assembly in or about July 2020. (Kotzin at 1168.) The faculty rejected the new faculty handbook at that time. (Kotzin at 1164; P Exh 50.)

In conjunction with the introduction of the July 2020 Handbook, the College created and issued employment agreements to the faculty. (Macur at 658; P Exh 2.) According to the July 2020 Handbook, any faculty member that fails to sign an employment agreement “is an at-will employee, and no at-will employee shall claim any right or benefit under the Faculty Handbook.”

(ER Exh 5 at p 3.) No faculty member signed an employment agreement. (P Exh 50; testimony of Susan Steffan at page 764 of the transcript, hereinafter “Steffan at X;” Kotzin at 1173.) Consequently, there is no evidence in the record that the July 2020 Handbook is in effect for any faculty member or members.¹

In or about July 2020, the College instituted an appendix to the July 2020 Handbook, which addressed faculty academic governance, labeled as “Appendix 4.8.” (ER Exh 7.) Appendix 4.8 was created, according to President Macur, from the 2018 Handbook and is an appendix to the current, July 2020 Handbook. (Macur at 124-25.) Moving such provisions from the 2018 Handbook to Appendix 4.8 was done at the direction of the Board of Trustees. (Macur at 741-42.) Faculty members were largely unaware of the existence of Appendix 4.8 prior to the filing of the Notice of Petition for Election to Region 3 of the NLRB, and said appendix was largely unavailable to faculty prior to October 14, 2020. (Board Exhibit 1(a); Steffan at 844.) Appendix 4.8 differed from the faculty academic governance provisions in the 2018 Handbook in material ways, including the removal of some faculty committees. (Kotzin at 1138.) As a result of hearing testimony from Petitioner’s witnesses at the Representation Hearing before Region 3 of the NLRB, the Employer re-wrote Appendix 4.8 and introduced it as an exhibit at the hearing. (Macur at 1597; ER Exh. 562.)² Dr. Macur testified that Appendix 4.8 is currently in effect, but there is no documentation in the record that any version of Appendix 4.8 exists independent of the July 2020 Handbook, nor that its supposed independent existence was ever

¹ Notably, counsel for Petitioner objected to the introduction of the July 2020 handbook as irrelevant. See, transcript at page 81. As part of Petitioner’s objection, counsel requested that the Employer supply documentation indicating that the July 2020 handbook was in effect; no such documentation was introduced into the record. See, transcript at page 82. Petitioner’s objection was overruled. *Ibid.*

² Counsel for Petitioner objected to the introduction of the modified Appendix 4.8 as inappropriate, given that it was created in direct response to the testimony of Petitioner’s witnesses at the Representation Hearing. See, transcript at page 1598. Petitioner’s objection was overruled. *Id.* at 1599.

communicated to the faculty prior to Petitioner's filing of the Notice of Petition for Election. (Macur at 125, 1599; ER Exh. 561.)

Course Catalogs

Medaille articulates various academic policies and procedures within the annual course catalogs, both for undergraduate and graduate students. (ER Exh 3; ER Exh 6; ER Exh 408; ER Exh 409.) Course catalogs are published annually. (Macur at 34; Steffan at 845.) Course catalogs are released in the August prior to the start of the academic year. (Steffan at 846.) There were no course catalogs for the 2020-21 academic year prior to the filing of the Petition in this matter. (Macur at 36, 581; Steffan at 846.) Susan Steffan is the Department Chair for the Department of Business Management and Leadership. (Steffan at 744.) Ms. Steffan testified on October 15, 2020 that the Undergraduate Course Catalog was unavailable for Department Chairs earlier in the 2020-21 academic year. (Steffan at 846.) The academic integrity policy contained in the course catalog was not in place at the start of the 2020-21 academic year. (Testimony of Alice Villaseñor at page 1562, hereinafter "Villaseñor at X.") Graduation requirements for programs started under the old catalog survive past the end date of course catalogs, when degrees are started under such expired catalogs. (Macur at 36.) There was no policy or communication to faculty extending any other provisions of the 2019-20 course catalogs into the 2020-21 academic year. (Steffan at 848.) Faculty understood this to mean that no academic policies were officially in place as the start of the 2020-21 academic year. (Villaseñor at 1562-63.) Course catalogs for the 2020-21 academic year were eventually put into place by the College on or about October 7, 2020; after the Petitioner filed its Petition with the NLRB and just in time for the Employer to introduce them as exhibits in this matter. (Macur at 581; ER Exhs 408 and 409.)

Faculty Committees

Prior to April 27, 2020, faculty committees existed at Medialle by operation of the faculty handbook. (P Exh 1 at p 70-82.) Faculty committees elected from faculty members included, among others, the Promotion and Tenure Committee, Grievance Committee, and Sabbatical Leave Committee. (*Id.* at 71.)

It is unclear which, if any, of the elected faculty committees still officially exist at Medaille. First, since there is no faculty handbook which currently applies, such committees, as creations of the 2018 Handbook, do not officially exist. See, Faculty Handbooks, *supra*. If there were a faculty handbook which applied to the Medaille faculty, it would be the July 2020 Handbook, and Appendix 4.8 of that handbook. (Macur at 618; ER Exh 5; ER Exh 7.) Prior to October 21, 2020, the version of Appendix 4.8 which was in place had eliminated several elected committees, such as the Promotion and Tenure Committee, Grievance Committee, and Sabbatical Leave Committee. (*Compare*, P Exh 1 at p 71 and ER Exh 7 at p 10.) Dr. Macur repeatedly characterized the elimination of such committees as “inadvertent.” (Macur at 133, 639, 659, 660, 1601.) However, such assertions run counter to documentary and other evidence in the record. Specifically, while draft versions of a new faculty handbook were considered by the Faculty Council in or about April 2020, a red-line version of the 2018 Handbook created by Dr. Macur and sent to the Faculty Council explicitly eliminated the Promotion and Tenure Committee and Sabbatical Leave Committee. (Kotzin at 1159; P Exh 5 at p 73.) In April 2020, Dr. Macur also expressed to the Faculty Council a desire to eliminate the Grievance Committee. (Kotzin at 1159.)

On October 21, 2020, the College instituted a new version of Appendix 4.8, which created the Promotion Committee and re-created the Sabbatical Leave Committee. (ER Exh 561;

ER Exh 562 at pp 14, 16.) Such revisions were made without faculty input. (Macur at 1602-03.³) Notably, there is nothing in the record which demonstrates that the October 21, 2020 Appendix 4.8 exists independently of the July 2020 Handbook, which does not apply to any faculty member. (*See, Faculty Handbooks, supra.*) Furthermore, the cover of the October 21, 2020 Appendix 4.8 identifies itself as “Volume IV – Faculty Handbook.” (ER Exh 562 at cover.)

Many of the faculty committees continue to exist, unofficially, on the faculty’s own initiative. (Kotzin at 1139.) Dr. Daniel Kotzin, the Chair of the Faculty Council, testified that the faculty continued the committees after the suspension of the 2018 Handbook, “because our goal was to eventually get the 2018 handbook back. And so we hoped that that might happen, and that way the committees would be up and running.” (*Ibid.*) Many key committees are unsure about what, if any, role they play with the College. Specifically, the UCC met on October 14, 2020 and spent the entire meeting attempting to figure out if it still had a “charge,” was still authorized to meet, and what it was supposed to be doing. (Steffan at 843.) Similarly, the GPC met on the same day, October 14, 2020, and had “general confusion” about what its role was with Medaille. (Steffan at 855.) Furthermore, the AQPC met for this academic year, elected its chair, and then suspended itself. (Kotzin at 1146; Steffan at 909.)

Prior to April 27, 2020, when the 2018 Handbook was suspended, the faculty committees played mere advisory roles to the College administration and were regularly superseded by decisions of members of the administration, such as the VPAA. Thus, when they existed, the various faculty committees did not truly exercise actual decision-making authority. Specifically,

³ Dr. Macur did offer some vague and unsubstantiated testimony that he believed, prior to his tenure as president of Medaille, that the faculty had some input on the original creation of the policies referenced in Appendix 4.8. See, Macur at 135, 1603.

the record demonstrates that decisions of the Sabbatical committee were ignored by the College. (Kotzin at 1141.) The UCC, which reviewed and recommended changes that impact undergraduate curriculum, had roughly one-third of its proposals revised by the VPAA. (Steffan at 833, 836.) This ratio may have actually been much higher, as the VPAA often approached individual faculty members that had brought proposals to the UCC in order to demand changes, outside of UCC meetings. (Steffan at 836.) When the VPAA did so, such changes would not go back to the UCC for ratification; it is thus impossible to tell how many undergraduate curriculum proposals were changed or rejected by the VPAA. (Steffan at 836-37.) Similarly, changes to graduate curriculum should have gone through the GPC, but similar to the procedures at the UCC, were revised roughly one-third of the time by the VPAA (Steffan at 850, 852.) Furthermore, the actual ratio of VPAA revision of proposals before the GPC may have been much higher because, like the with the UCC, the VPAA often approached faculty members that made proposals in order to demand changes. (Steffan at 852.) Such revisions made outside of the GPC often did not return to the GPC for ratification. (Steffan at 852.)

Program Directors

Both versions of Appendix 4.8 to the July 2020 Handbook articulate the powers and duties of Program Directors. (ER Exh 7 at pp 4-5; ER Exh 562 at pp 6-7.) Neither version of Appendix 4.8 are currently in force at the College. See, Faculty Handbooks, *supra*. Consequently, it is not clear about what roles and responsibilities Program Directors have at the College since it is impossible to tell exactly what such roles and responsibilities are. To the extent it may be relevant, the record does address the job responsibilities of Program Directors prior to April 27, 2020.

There are roughly thirty different academic programs offered at Medaille. (Macur at 20.) “Programs” are generally academic majors or minors, but in some circumstances, such as with the College honors program, can be independent of a major or minor. (Macur at 22.) Most, but not all, of the programs exist within an academic department. (ER Exh 2.) Academic departments were headed by Department Chairs; programs were headed by Program Directors. (*Ibid.*) Program Directors were appointed by the VPAA. (Steffan at 1023.)

Prior to April 27, 2020, the job duties of Program Directors varied widely based on which academic department it was associated with, if any. (Villaseñor at 1484.) Program Directors might have worked with the academic advising office to inform them of program requirements. (Kotzin at 1207.) Program Directors also might have worked with students enrolled in their programs as a sort of advisor; sometime to resolve student problems. (Kotzin at 1207, 1273; Steffan at 1025-26). Program Directors also may have tried to resolve problems that adjuncts had. (Steffan at 1026). Program Directors that addressed problems adjuncts had, but could not resolve such issues with either students or adjuncts, passed the issue along to someone else, often the Department Chair. (Steffan at 1025-26).

Department Chairs sometimes recommended to the VPAA members of the department to be Program Directors, which was often like “begging” for someone to be willing to be a Program Director, because Chairs often didn’t “have choices.” (Steffan at 1024.) Recommendations were not necessarily based on who would be the “best fit,” but rather who was willing. (Steffan at 1025.) It is unclear who would, if anyone, recommend Program Directors for programs that were not within an academic department.

Program Directors worked collaboratively with faculty members and adjuncts within the program in order to build class schedules. (Steffan at 1020-21; Villaseñor at 1495-96.) Class

schedules that were compiled by Program Directors had been overruled by the VPAA.

(Villaseñor at 1497-98, 1503.)

Some programs – although how many is unclear – were eliminated with students still in them, so the Program Director stayed on to “teach out” such students that were already in the program. (Steffan at 1022.)

In some departments, prior to April 27, 2020, Program Directors recommended adjunct faculty members to teach classes within the program. (Steffan at 1029-30.) These recommendations were from an existing pool of hired and trained adjuncts. (Steffan at 1030.) Typically, the Program Director simply approached someone who had taught the class in the past. (Steffan at 1034.) The adjunct was then approved by the Department Chair and then the VPAA. (Steffan at 1031-32.) Neither Department Chairs nor Program Directors hired adjuncts; only the VPAA could hire and appoint adjuncts. (Steffan at 1035.) Department Chairs did not always accept the recommendations of Program Directors for using adjunct faculty. (Steffan at 1036-37.) The VPAA did not always accept department or program recommendations on adjuncts. (Steffan at 1035, 1039.)

Some Program Directors had no involvement at all with adjunct faculty. (Kotzin at 1276.) The record is unclear as to which or how many Program Directors had no involvement with adjunct faculty. In one department, Program Directors mentored adjuncts. (Villaseñor at 1504.) Such mentoring included classroom observations and observation forms that were shared with the adjunct. (Villaseñor at 1506.) This was done to help adjuncts improve their teaching. (*Ibid.*) In one other department, Program Directors were available to answer adjunct questions, and possibly bring adjunct concerns to Department Chairs. (Steffan at 1040-41; 1049.)

In one program, Program Directors played a role in the faculty self-evaluation process for faculty in their program. (Villaseñor at 1512.) There is no indication that Program Directors in other programs played similar roles.

Some Program Directors had no role in recruiting adjuncts. (Steffan at 1030.) In other departments, Program Directors might have made suggestions to Department Chairs regarding the recruitment of adjuncts. (Villaseñor at 1314.) The record is unclear as to which or how many specific Program Directors played any role in the recruitment of adjuncts or what that role was. Program Directors did not formally evaluate adjuncts, but rather were available to adjuncts to “answer any questions” and to “be available if [adjuncts] have any concerns.” (Steffan at 1040.)

Department Chairs

Both versions of Appendix 4.8 to the July 2020 Handbook articulate the powers and duties of Academic Department Chairs. (ER Exh 7 at pp 2-4; ER Exh 562 at pp 4-6.) Neither version of Appendix 4.8 are currently in force at the College. See, Faculty Handbooks, *supra*. Consequently, it is not clear about what roles and responsibilities Department Chairs have at the College since it is impossible to tell exactly what such roles and responsibilities are. To the extent it may be relevant, the record does address the job responsibilities of Department Chairs prior to April 27, 2020.

There are seven academic departments, each had its own chair. (ER Exh 2.) Prior to April 27, 2020, Department Chairs were generally elected by their department. (Macur at 710.) There were times when a Department Chair was appointed rather than elected. (Kotzin at 1121.) The election of Department Chairs had been be over-ridden by the VPAA. (Macur at 711.) The record is unclear as to how often that happened. (Macur at 711.)

Department Chairs maintained the department schedule, ran department meetings, shared with other faculty in the evaluation process, and made recommendations. (Horne-Moyer at 1313.) Agendas for department meetings were set by the Chair requesting agenda items from department members. (Steffan at 1017.) Department Chairs generally did not have final decision-making authority. (Horne-Moyer at 1314.) Chairs would assist the administration in the recruitment of adjunct faculty, generally through staffing requests to the Academic Affairs office. (*Ibid.*) Chairs did not have final decision-making authority over the hiring or firing of adjunct faculty. (Horne-Moyer at 1314; Steffan at 1035.) Recommendations by the Chair for the hiring of adjunct faculty were, at times, rejected. (Horne-Moyer at 1315; Steffan at 1035, 1039.) Sometimes, the College would engage in the recruitment of adjunct faculty without any requests by Chairs and without any input from the Chairs. (Steffan at 754; P Exh 10; P Exh 11.) Department Chairs, therefore, did not hire adjunct faculty nor did they effectively recommend the hiring of adjuncts.

There is nothing in the record that supports the conclusion that Department Chairs could ever fire adjuncts, nor any other employee. When adjuncts were hired by the College, they went through a training course “we call it Faculty 101,” went through the personnel department, and then entered a kind of “pool” of adjuncts. (Steffan at 1030-31.) The entire academic department would then review adjuncts in the pool to determine if they were adequate for teaching classes within the department. (Steffan at 1031-32.) Department recommendations for the use of adjuncts must be approved by the VPAA. (Steffan at 1032.) Not all recommendations were followed by the VPAA. (Steffan at 1035, 1047-48.) A department’s failure to positively recommend an adjunct had no impact on the adjunct’s employment status; they still remained in the adjunct pool and were used by other departments. (Steffan at 1109.)

Before April 27, 2020, Department Chairs made recommendations to administration to add new full-time positions to their department. (Horne-Moyer at 1317; P Exh 60.) Those recommendations were not always approved by the VPAA. (Horne-Moyer at 1321; P Exhs 61, 62, 63.) Sometimes, recommendations for new positions were unilaterally modified by the VPAA and then approved in a manner different from what the Chair had recommended. (Horne-Moyer at 1327-29.) Department Chairs and other faculty were involved in search committees in order to fill full-time positions. (Steffan at 745; Kotzin at 1246; Horne-Moyer at 1399.) Recommendations by Department Chairs regarding the nature of search committees, such as changing a search from a tenure-track position to a non-tenure-track position, were sometimes rejected by the VPAA. (Steffan at 746-48.) Search committees were sometimes cancelled by the VPAA. (Steffan at 817.) Search committees did not have any say or engage in any negotiation with candidates as to the salary or benefits that the potential candidate would receive. (Steffan at 1107-08.) The ultimate recommendations of search committees were subject to independent review by administration. Specifically, candidates would first interview with the search committee, but if successful, would then move on to interviews with the College President, the VPAA, and even perform a teaching demonstration in front of students. (Steffan at 933.)

Department Chairs played a role in deciding which courses from other colleges and universities that Medaille might honor as transfer credits. (Steffan at 1013; Kotzin at 1261-62.) Such a role was limited to receiving information from the Medaille Registrar about the course from another institution and determining if there was an equivalent at Medaille. (Kotzin at 1262.) Similarly, Department Chairs played a role in articulation agreements with other colleges and universities. (Steffan at ; Kotzin at 1260-61.) Such a role was limited to receiving from the

VPAA a list of courses at the other institution, and then reviewing the list to identify which courses at Medaille might be equivalent. (Kotzin at 1261.) In all cases, the recommendations were subject to the review of the VPAA. (Steffan at 801-02.)

Chairs played a role in the faculty evaluation process prior to April 27, 2020, but did not actually evaluate faculty. Specifically, faculty members completed a self-evaluation, which the Chair reviewed and commented on. (Steffan at 1071.) Ultimate employment decisions were not made by the College based solely on the faculty self-evaluations nor the Chairs comments on such evaluations. (Steffan at 1072.) In fact, when a Chair voiced an opinion to not renew a faculty member, her opinion was rejected by the VPAA, and she was instructed to modify her documentation regarding the evaluation process. (Steffan at 770-779; P Exhs 19, 20, 21, 22.) This calls into question any and all documentation regarding the role Department Chairs played in the faculty evaluation process, as it is impossible to tell which or how many of the evaluations signed by the Chairs were modified per the instruction of the VPAA.

Prior to April 27, 2020, Chairs made recommendations regarding the renewal of faculty members. (Horne-Moyer at 1329.) Such recommendations were not always followed by the administration. (Horne-Moyer at 1330-31.) Chairs were sometimes involved in the non-renewal process for faculty; often through documenting the process. (Horne-Moyer at 1331.) Such documentation was performed according to a sort of script supplied by the administration, and/or the Chair was directed to modify such documentation. (*Ibid.*)

Department Chairs would facilitate the creation of a class schedule for the department. (Steffan at 1020.) The creation of the schedule was generally collaborative, with the Chair soliciting ideas about possible changes to the schedule from the members of the department.

(*Ibid.*) The department schedule was ultimately sent to the Registrar and Academic Advising, which had the power to reject or demand changes to department schedules. (*Ibid.*)

Department Chairs played a role in their department's budget. (Horne-Moyer at 1332.) Such budgets did not include staffing costs, but rather items like accreditation expenses, instructional materials, office supplies, and possibly catering. (Steffan at 1059-60.) A Chair's role was limited to revising the previous year's budget to fit targets set by the administration. (Horne-Moyer at 1332; Steffan at 1058.) Chairs had no say in the amount of money was in the department budget. (Steffan at 1066.) Any changes to the department budget had to be approved by administration. (Steffan at 1061.)

Library Director

Both versions of Appendix 4.8 to the July 2020 Handbook articulate the powers and duties of the Library Director. (ER Exh 7 at pp 6-7; ER Exh 562 at pp 7-8.) Neither version of Appendix 4.8 are currently in force at the College. See, Faculty Handbooks, *supra*. Consequently, it is not clear about what roles and responsibilities Library Director has at the College since it is impossible to tell exactly what such roles and responsibilities are. To the extent it may be relevant, the record does address the job responsibilities of the Library Director prior to April 27, 2020.

President Macur offered testimony regarding the nature of what the Library Director's duties were, chiefly by testifying from the list of job duties found in one version of Appendix 4.8. (Macur at 156-59.) No testimony was given at the hearing from the Library Director. The scant documentary evidence produced at the hearing regarding the Library Director was the result of a 2018 search committee from the Library Director acting as the Search Committee

Chair, and a Position Approval Form from 2018 for the Rochester Campus Library Coordinator. (ER Exh 34; ER Exh 79.)

ARGUMENT

When making a determination regarding the appropriateness of a proposed unit, the Board will first consider the union's petition and whether the proposed unit is appropriate. See, *Overnite Transportation Co.*, 322 NLRB 723 (1996). "There is nothing in the statute which requires that the unit for bargaining be the *only* appropriate unit, or the *ultimate* unit, or the *most* appropriate unit; the Act only requires that the unit be 'appropriate.'" *Id.* at 723 (emphasis in original), quoting, *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950).

In the instant matter, Petitioner has petitioned for a unit comprised of "all full-time and regular part-time faculty" employed by Employer and listed specific job titles to be included within the bargaining unit. (Board Exhibit 5; hereinafter, "Board Exh X.") The Employer objected to the entire unit on the basis that the entire faculty are managerial employees. (Board Exh 3.) Furthermore, the Employer seeks to exclude from any recognized unit three job titles within the petitioned-for unit: Department Chairs, Program Directors, and Library Director. (*Ibid.*)

For the reasons set forth below, the facts and evidence presented at the Representation hearing are inadequate for supporting the Employer's objection and requested exclusions. Therefore, the petitioned-for unit is appropriate, and Petitioner respectfully requests that the Region schedule an election in a manner requested by both of the parties at the conclusion of the hearing. (See, transcript of the October 1 – October 28, 2020 hearing at pages 1605-06, hereinafter, "Transcript at X.")

POINT I

NONE OF THE PETITIONED-FOR EMPLOYEES ARE MANAGERIAL.

In some limited cases, college faculty can be deemed managerial employees where the employer “depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals.” *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 689 (1980). Faculty will be deemed managerial where it has “divided loyalty” between the interests of the college and individual self-interests. *Id.* at 687-88. However, “employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage (of the Act) even if union membership arguably involved some divided loyalty.” *Id.* at 690.

In determining which proposed faculty units are inappropriate due to managerial concerns, the Board is guided by an evaluation of whether the faculty in question “‘substantially and pervasively’ operated the university by exercising extensive control over decision-making and playing a ‘crucial role ... in determining ... central policies of the institution.’” *Pacific Lutheran University*, 361 NLRB 1404 (2014) at 1419, quoting *NLRB v. Yeshiva Univ.*, 444 U.S. at 679. The Board will evaluate such factors as areas of college decision making, and the existence of actual control or effective recommendation. *Pacific Lutheran University*, 361 NLRB at 1420-21. When analyzing university decision making, the Board will look to three areas of “primary decision making:” 1. Academic Programs, 2. Enrollment management, and 3. Finances. *Ibid.* The Board will also look to two areas of “secondary decision making:” 1. Academic Policy, and 2. Personnel Policy and Decisions. *Ibid.*

Parties asserting managerial status for college faculty not only carry the burden to establish such status, but also “must prove actual – rather than mere paper – authority.” *Id.* at

1421. There must be “specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decisionmaking area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed.” *Ibid.*

In the instant matter, Medaille has not met its burden to show that the faculty in the petitioned-for unit are managerial. It has not provided anything beyond conclusory evidence to demonstrate that faculty at the College exercise actual control nor effective recommendation in the areas of academic programs, enrollment management, finances, academic policy, nor personnel policy and decisions.

A. Medaille Does Not Rely On The Professional Judgment Of Its Faculty To Formulate And Apply Crucial Policies.

Prior to April 27, 2020, College governance and policies were published in the 2018 Faculty Handbook, which by its own terms, “contains and explains the policies and processes relating to the faculty and faculty status.” (P Exh 1 at p 1.) The 2018 Faculty Handbook addressed numerous terms of employment for College faculty, including among other things, faculty ranks, appointment policies, evaluation and review procedures, promotion policies, the creation of tenure and policies relating thereto, termination and layoff, and working conditions such as workload, compensation, and a discrimination and harassment policy. (*Id.* at pp 3-68.)

The 2018 Faculty Handbook created the appearance of shared governance between the faculty and College administration with respect to Personnel Policy and Decisions as well as College Finances through the creation of various faculty committees. (P Exh 1 at p 70.) Such committees included the Faculty Council, Promotion and Tenure Committee, Grievance Committee, Hearing Committee, Faculty Compensation Committee (replaced in or about 2017

by the Budget Committee or the Budget and Compensation Committee), Faculty Development Committee, Sabbatical Leave Committee, and the Academic Quality Program Committee or AQPC. (P Exh 1 at p 71; Macur at 135.)

The 2018 Faculty Handbook created the appearance of shared governance between the faculty and College administration with respect to Academic Programs, Enrollment Management, and Academic Policy through the creation of committees such as the Undergraduate Curriculum Committee or UCC, the Undergraduate Educational Policies Committee or UEPC, the Undergraduate Academic Standards Committee (sometimes known as the Academic Standards Committee), and the Graduate Program Council or GPC. (P Exh 1 at pp 76-82.)

Even that façade of shared governance was wiped away when the 2018 Faculty Handbook was suspended by the College on or about April 27, 2020. (Macur at 620; P Exh 3.) While the President of Medaille Dr. Kenneth Macur asserted that a new college handbook was put in place in or about July of 2020, there is nothing in the record other than the conclusory statements of the President to support Macur's conclusion. Specifically, the 2018 Faculty Handbook listed specific steps for its own temporary suspension and/or its revision. (P Exh 1 at pp 88-90.) Point 7. of section 4.14.1 of the 2018 Handbook allowed the President of the College to suspend the handbook for a period of "no more than six (6) months." *Id.* at p 89. While on April 27, 2020, President Macur communicated to the faculty that the suspension of the 2018 Handbook was indeed temporary and would last no more than six (6) months, the record demonstrates that the College did not end the suspension six months after April 27, 2020. Rather, in or about July 2020, the College intended to permanently replace the 2018 Handbook with the July 2020 Handbook which is, according to President Macur, neither temporary nor an

interim handbook. (Macur at 618.) The 2018 Handbook was eliminated by the College administration, not suspended, and it was done with no procedure or policy authorizing such elimination.

The College's attempt to impose the July 2020 Handbook was a unilateral and arbitrary action by the College, taken independent of any faculty input. Section 4.14.1 of the 2018 Handbook lists several necessary steps for the revision of the handbook. (P Exh 1 at pp 88-89.) While the faculty and the College did engage in some of the steps necessary for the revision of the 2018 Handbook, not all required steps were taken. (P Exh 1 at p 89; Macur at 691.) Specifically, while section 4.14.1 requires, among other things, a two-thirds vote on any proposed changes by the full-time teaching faculty, no such vote was taken. (*Ibid.*) Similarly, a required 120-day review by the Faculty Assembly of all prospective changes was never completed. (*Ibid.*) According to section 4.14.1 of the 2018 Handbook, "[a]ny proposed revisions to any part of the *Faculty Handbook/Volume IV* shall have no status, not even a promissory one, until completion of revision procedures as outlined in this section." (P Exh 1 at p 90.) Therefore, the July 2020 Handbook is not a revision of the 2018 Faculty Handbook, as it was created independently of the revision procedures detailed in section 4.14.1 of the 2018 Handbook.

Even if the 2018 Handbook did not invalidate the July 2020 Handbook for failing to follow the requisite revision procedures of section 4.14.1, the faculty still had no say in the College's intended implementation of the new handbook. In fact, it is undisputed in the record that the faculty rejected the July 2020 Handbook, and communicated such rejection directly to the College Board of Trustees. (Kotzin at 1164; P Exh 50.)

By its own terms, the July 2020 Handbook is not in effect at Medaille, either. According to section 4.1 of the July 2020 Handbook, “[a]ll faculty members must sign an employment agreement. Any faculty member at Medaille who does not enter into a signed agreement is an at-will employee, and no at-will employee shall claim any right or benefit under the Faculty Handbook.” (ER Exh 5 at p 3.) There is no evidence in the record that any faculty member has signed an employment agreement. To the contrary, all the evidence in the record demonstrates that no faculty members signed employment agreements. (P Exh 50; Steffan at 764; Kotzin at 1173.) The July 2020 Handbook is therefore not in effect, by operation of its own provisions.

The fact that all College faculty are at-will employees, by itself, invalidates any claim that faculty are managerial. The Board in *Pacific Lutheran University*, when formulating the test for managerial status among college and university faculty, found that “faculty who, unlike traditional faculty, have been appointed with no prospect of tenure and often no guarantee of employment beyond the academic year” constitute “contingent faculty.” 361 NLRB at 1422. Medaille faculty, as at-will employees that don’t have a guarantee of employment for any period of time, let alone to the end of the academic year, are contingent faculty. (ER Exh 5 at p 3; P Exh 50; Steffan at 764; Kotzin at 1173.) As was the case in *Pacific Lutheran University*, the ability of faculty at Medaille to exert any control or effective recommendation “is inherently limited by the very nature of their employment relationship” with the College. 361 NLRB at 1428. The Board in *Pacific Lutheran University* ultimately held that the contingent faculty did not control or effectively recommend relevant decision-making. *Ibid.*

President Macur was clear in his testimony that he and the College believed the July 2020 Handbook to be in effect. (Macur at 618.) If this could somehow, inexplicably be true, then the July 2020 Handbook is in effect contrary to the dictates of the 2018 Faculty Handbook because

the requisite revision procedures were not followed. It is in effect contrary to the stated will of the faculty, as demonstrated through the rejection of the document by the faculty. (P Exh 50.) It is in effect contrary to the operation of its own provisions, because no faculty member has signed an employment agreement. The only possible way that the July 2020 Handbook could possibly be in effect, then, is by the unilateral action of the College, unfettered by any input of the faculty and unsupported by any published policies or procedures of the College.

No matter what the true status of the faculty handbook is, the College does not rely on the professional judgment of its faculty to formulate and apply crucial policies. If there is no faculty handbook in place, then no official faculty committees exist. Every faculty committee that provides input as to Academic Programs, Enrollment Management, Finances, Academic Policy, and/or Personnel Policy and Decisions is a creation of some version of the faculty handbook. *Unofficial* committees exist by creation of the faculty themselves, merely based on the faculty's hopes that the College might someday restore the 2018 Faculty Handbook, at which time the former "committees would already be up and running." (Kotzin at 1139.) The record also demonstrates that critical committees such as the UCC, GPC, and AQPC, all of which are dedicated to the central College policies of Academic Program and Academic Policy, are currently unsure of their official existence or role at the College. (Steffan at 843, 855, 909; Kotzin at 1146.) The AQPC even dissolved itself, with no evidence of any remedial action taken by the College. (Steffan at 909; Kotzin at 1146.)

If somehow there are any official committees in existence, they are not the creation of any published procedure or policy, and are in place independent of any input by the faculty, as demonstrated by the faculty's rejection of the July 2020 Handbook and the refusal of faculty members to sign employment agreements. Such mysterious official committees, then, are

apparently destroyed and created merely by the whim of the College administration, and not by any published procedure or policy, and without any input from the faculty. Such arbitrary action by the College demonstrates that Medaille does not rely on the professional judgment of the faculty to formulate and apply crucial policies. The College relies solely on the arbitrary decisions of administration. Consequently, faculty are not managerial employees. *Pacific Lutheran University*, 361 NLRB at 1419, quoting *NLRB v. Yeshiva Univ.*, 444 U.S. at 679.

The fact that the so-called shared governance language from the 2018 Faculty Handbook was allegedly resurrected by an appendix to the July 2020 Handbook – Appendix 4.8 – does not detract from the conclusion that the formulation and application of crucial policies is done solely by College administration. First and foremost, Appendix 4.8 is an appendix to the July 2020 Handbook – a handbook that doesn’t exist. (Macur at 124-25.) There is nothing in the record which demonstrates that Appendix 4.8 exists independently of the July 2020 Handbook. The October 2020 re-write of Appendix evens identifies itself as “Volume IV – Faculty Handbook.” (ER Exh 562 at cover.) Therefore, Appendix 4.8 either doesn’t truly exist, and therefore none of its language that is allegedly dedicated to shared governance applies. Conversely, Appendix 4.8 somehow does exist, but not by its own mechanisms and not by any action or demonstrated consent of the faculty. Rather, if Appendix 4.8 exists, then it and its platitudes of shared governance are destroyed and created by the whim of the College administration, relying only on its own arbitrary decision making.

Similarly, any policies contained within College course catalogs are also not a source of alleged shared governance nor evidence that Medaille relies on the professional judgment of the faculty to formulate and apply crucial policies. As a threshold matter, no course catalog was in effect at the time of the filing of the Petition in the instant matter. More specifically, course

catalogs are generally published annually and released in August prior to the start of the academic year. (Macur at 34; Steffan at 845.) There was no course catalog for the 2020-21 academic year prior to October 7, 2020. (Macur at 581; ER Exhs 408 and 409.) President Macur testified that the 2020-21 course catalogs, though unpublished, somehow existed. (Macur at 36.) No evidence or testimony supporting this conclusion was offered. Meanwhile, Ms. Susan Steffan, a Department Chair at the College, testified on October 15, 2020 that the Undergraduate Course Catalog was unavailable for Department Chairs earlier in the 2020-21 academic year. (Steffan at 846.) Similarly, faculty looking for the academic integrity policy were unable to access the policy because the course catalog was not available. (Villaseñor at 1451.) The fact that course catalogs were somehow finished, roughly two months late, after the date of the filing of the Petition in this matter, and just in time to be introduced as exhibits at the hearing, is also not availing. If anything, it demonstrates a continuing pattern for the College administration: central College policies are destroyed and created, or held in abeyance as seems to be the case for the course catalogs, at the arbitrary whim of the administration and not by any published policy or procedure, and certainly without the input of the faculty.

B. Medaille Has Not Met Its Burden To Demonstrate That Faculty Exercise Actual Control Or Effective Recommendation In Areas Of Primary Decision Making.

For the purposes of establishing managerial status for faculty at a college or university, the party asserting managerial status for such employees must show actual control or effective decision making in areas of primary and/or secondary decision making. *Pacific Lutheran University*, 361 NLRB at 1420-21. Areas of primary decision making include Academic Programs, Enrollment management, and/or Finances. *Ibid.* These areas are “more important” than areas of secondary decision making. *Id.* at 1420. Parties asserting managerial status for college faculty not only carry the burden to establish such status, but also “must prove actual –

rather than mere paper – authority.” *Id.* at 1421. There must be “specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decisionmaking area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed.” *Ibid.*

Medaille has not established that its faculty exercise such control or effective recommendation in areas of primary decision making, chiefly because there currently exists no body or official vehicle for faculty to exercise such control or effective recommendation. Such bodies did exist, at least on paper, by operation of the 2018 Handbook, which is no longer in place and which has not been effectively replaced. See, Point I. A. “Medaille Does Not Rely On The Professional Judgment Of Its Faculty To Formulate And Apply Crucial Policies,” *supra*.

However, even if the 2018 Handbook were somehow still in place, with all of its language that purportedly creates and maintains shared governance between the faculty and administration, it does not prove actual, rather than mere paper, authority for the faculty. Meanwhile, in every key area of analysis, the record demonstrates that actual authority rested with administration during the times that the 2018 Faculty Handbook was in effect. Or, at the very most, the record is unclear as to whether the faculty or administration held actual authority or whether the faculty offered effective recommendation to the College. Thus, assuming that the time period during which the 2018 Faculty Handbook was not made completely irrelevant by the suspension and elimination of said handbook in April 2020, then the College has nevertheless failed to meet its burden to demonstrate managerial authority by the faculty.

1. Medaille Has Not Met Its Burden To Demonstrate That Faculty Exercised Actual Control Or Effective Recommendation In Academic Programs.

An analysis of decision making in the area of Academic Programs includes “topics such as the university’s Curricular, research, major, minor, and certificate offerings and the requirements to complete successfully those offerings.” *Pacific Lutheran University*, 361 NLRB at 1420. Academic Programs were, according to the 2018 Faculty Handbook, addressed by faculty committees such as the Undergraduate Curriculum Committee or UCC, the Graduate Program Committee or GPC, the Academic Quality Program Committee, and the Undergraduate Education Policies Committee or UEPC.

The UEPC was a faculty committee that recommended policies regarding undergraduate education to the administration. (Villaseñor at 1431.) UEPC discussed things like the academic calendar, admissions requirements, student progress reports, and final exam grading schedules, among other things. (Villaseñor at 1432, 1435.) Recommendations on issues such as final exam grading schedules were sometimes followed by the VPAA, and sometimes the VPAA would make changes to such areas of academic policy unilaterally and without consulting the UEPC. (Villaseñor at 1436-37; P Exh 64.) Sometimes, the VPAA simply ignored the recommendations of the UEPC and implemented calendar changes on her own volition. (Villaseñor at 1438-39.) Thus, the UEPC exerted neither actual control nor effective recommendation over Academic Programs.

The UCC reviewed and recommended changes that impacted undergraduate curriculum, such as new courses, program changes, or new programs. (Steffan at 833.) The general procedure for the UCC was that a faculty member would, typically in writing, submit to the committee proposed changes to undergraduate curriculum. (*Ibid.*) At a meeting, the UCC would then either vote on the proposed changes or table such proposals. (Steffan at 834.) If a vote was

taken and a change approved, then the proposed change would be submitted to the VPAA. (*Ibid.*) The VPAA would demand changes for roughly as one-third of proposals before the UCC. (Steffan at 836.) This ratio may have been much higher, as the VPAA often approached the individual faculty member that originally made the proposal in order to demand changes. (*Ibid.*) When the VPAA did so, such changes would not go back to the UCC for ratification. (Steffan at 836-37.) It is thus impossible to tell how many undergraduate curriculum proposals were changed or rejected by the VPAA. The record does not establish control nor effective recommendation of Academic Programs by faculty through the UCC.

The GPC reviewed and recommended course changes, program changes, and new courses for graduate curriculum. (Steffan at 850.) The general procedure for the GPC was similar to that of the UCC: individual faculty members would submit their proposals to the GPC, which would then discuss and possibly vote on the proposed changes. (Steffan at 851.) Proposals that received a vote of approval from the GPC would then go to the VPAA. (*Ibid.*) The VPAA demanded changes for roughly one third of the proposals brought before the GPC. (Steffan at 852.) This ratio may have been much higher, because similar to what happened to proposals before the UCC, the VPAA would often approach the individual faculty member that made the proposal to demand changes. (*Ibid.*) Such revisions were made outside of the GPC and would not return to the GPC for review or vote. (*Ibid.*) It is thus impossible to tell how many graduate curriculum proposals were changed or rejected by the VPAA. The record does not establish control nor effective recommendation of Academic Programs by faculty through the GPC.

Department Chairs played a role in deciding which courses from other colleges and universities that Medaille might honor as transfer credits. (Steffan at 1013; Kotzin at 1261-62.)

Such a role was limited to receiving information from the Medaille Registrar about the course from another institution and determining if there was an equivalent at Medaille. (Kotzin at 1262.) This role was ministerial in nature, performed by a very few faculty members, uncommon, and thus insufficient to raise the entire faculty to the level of managerial.

Similarly, Department Chairs played a role in articulation agreements with other colleges and universities. (Steffan at ; Kotzin at 1260-61.) Such a role was limited to receiving from the VPAA a list of courses at the other institution, and then reviewing the list to identify which courses at Medaille might be equivalent. (Kotzin at 1261.) In all cases, the recommendations were subject to the review of the VPAA. (Steffan at 801-02.) The Board has determined that college faculty do not effectively recommend hiring where, as here, the results of a search committee are independently reviewed by administration. *University of Great Falls*, 325 NLRB 83, 97 (1997)(“effective recommendation authority is found where nearly all recommendations are routinely approved by the administrative hierarchy, *without independent review*” emphasis added).

2. Medaille Has Not Met Its Burden To Demonstrate That Faculty Exercised Actual Control Or Effective Recommendation In Enrollment Management.

An analysis of decision making in the area of Enrollment Management “dictates the size, scope, and make-up of the university’s student body.” *Pacific Lutheran University*, 361 NLRB at 1420. Issues of enrollment management under the 2018 Faculty Handbook were addressed by the UEPC or individual academic departments. At the UEPC, faculty had no more than an advisory role to the College, exemplified by an email from President Macur to the UEPC in April 2019 that the “president establishes all admission requirements.” (P Exh 65; Villaseñor at 1445.) Faculty, then, did not exercise control or effective recommendation over any enrollment management through the UEPC.

Program Directors recommended changes to enrollment for courses in their programs which were rejected by the VPAA. (Villaseñor at 1497-98.) Thus, Program Directors did not exercise control or effective recommendation over any enrollment management at Medaille.

Department Chairs had very little input on enrollment decisions. (P Exh 43; Steffan at 883.) In the Business Management and Leadership Department, for “a few years” prior to November of 2019, the Medaille administration did not allow any faculty input as to admission into the Business Program. (Steffan at 974.) During that time, the faculty had been “strongly advocating for getting involved in the review process.” (*Ibid.*) As Ms. Steffan, the Department Chair testified, such advocacy was directed towards “the enrollment folks, to the VPAA, to Dr. Macur, and any forum I could complain [to].” (Steffan at 1106.) The faculty’s efforts were unsuccessful for years, until finally the VPAA agreed to let the department faculty have some say in applicant review. (ER Exh 56; Steffan at 974.) This example of College administration eventually relenting to years of sustained faculty advocacy for a change in a central policy, after years of rejecting the ideas the faculty had advocated for, cannot be characterized as control or effective recommendation by the faculty. Central college policies are changed if and when the Medaille administration chooses to, whatever the recommendations or opinions of the faculty might be.

Meanwhile, the same department, after years of receiving pressure from the VPAA to increase student enrollment, requested to lower tuition for the Masters in Business Administration or MBA program as late as February 2019. (P Exh 28; Steffan at 1105.) This idea had been repeatedly rejected by the VPAA over the course of a few years. (Steffan at 1105.) At one point, the College did make a slight reduction in tuition for the program, but it was less than what the Business Department had requested and lasted for only one year. (*Ibid.*)

Finally, after being repeatedly unable to successfully lobby the College to reduce tuition for the MBA, the Business Department abandoned its recommendation, changed course, and requested a reduction in the number of credit hours required for the MBA program. (Steffan at 1105-06.) The Business Department was eventually successful in reducing the number of credit hours for the MBA program. (Steffan at 960-62.)

This example of changes to the MBA program is essential to the analysis of the alleged actual control or effective recommendation by the faculty for central policies of the College. Specifically, the Employer may hold out the reduction of the credit hours for the MBA program as an example of shared decision making and effective recommendation by the faculty over a central policy of the College: required credit hours for a graduate program. However, a more-thorough analysis of the facts demonstrates the exact opposite. The faculty of the Business Department had been receiving pressure from the VPAA to come up with some sort of plan to increase enrollment in the MBA program, and the top recommendation from the department was to lower tuition costs for the program. After years of the administration rejecting such a strategy (or making a temporary reduction of tuition that was “much smaller” than the department had requested), the Business Department finally abandoned its chosen recommendation to address the concerns raised by the VPAA, and instead proposed the idea of reducing credit hours required for the program. (Steffan at 1105.)

The record is not clear as to how many decisions the College made that happened to align with faculty input came, as was the case for addressing enrollment shortcomings for the MBA program, with repeated rejections of faculty ideas and recommendations before the final acceptance by the College administration of a second- or third-choice faculty recommendation that the administration decided was worthy of acceptance. Such a pattern does not support a

conclusion that the faculty at Medaille control or effectively recommend changes to central policies of the College. Simply relying on the various documents that the Employer entered into evidence to support Medaille's position that faculty are managerial is both factually and legally insufficient, as the examples of the Business Department demonstrate that such documentary evidence is "mere paper" faculty authority. *Pacific Lutheran University*, 361 NLRB at 1421.

3. Medaille Has Not Met Its Burden To Demonstrate That Faculty Exercised Actual Control Or Effective Recommendation In College Finances.

An analysis of decision making in the area of College Finances addresses "financial decision – both income and expenditure." *Pacific Lutheran University*, 361 NLRB at 1420. The 2018 Faculty Handbook created a Faculty Budget Committee or Budget Committee. (P Exh 1 at p 74-75.) The Budget Committee addressed the budget for the entire College; departments have their own budgets for non-salary costs, such as accreditation expenses, instructional materials, office supplies, etc. (Steffan at 1059-60, 1082.)

The Budget Committee would typically operate by faculty members receiving an emailed spreadsheet or information that was going to be reviewed at the meeting. (Steffan at 821.) This would be done the day before the committee meeting and would come from President Macur. (*Ibid.*) There was little discussion at the Budget Committee meetings; typically such meetings were "more of an explanation of the numbers than a back and forth discussion... ." (Steffan at 822.) The explanation of the numbers came from President Macur. (*Ibid.*) There is no evidence in the record that the faculty exercised any control or made any effective recommendation toward the College budget.

The lack of input by the faculty was mirrored in the Spring of 2020 by the College sharing less information than normal with the Budget Committee. Specifically, faculty at the April 2020 Budget Committee meeting "didn't get all the – the details." (Steffan at 823.)

Whereas the committee had normally received a spreadsheet with “perhaps 20 tabs with supporting detail,” what faculty members of the committee received for the April 2020 meeting was “more of – of a summary” with “maybe one or two supporting spreadsheets.” (*Ibid.*) Subsequent Budget Committee meetings that were scheduled for May and June of 2020 were not held. (*Ibid.*) There is no evidence that any of the work performed by the Budget Committee made any impact on the College budget.

Faculty members who once served on the Budget Committee met on September 20, 2020 with a few members of the College administration. (Steffan at 829.) The College Chief Financial Officer, Lerna Miterko, sent such faculty members a “PowerPoint presentation that had been given to the Board of Trustees,” which “didn’t contain the budget” and merely “showed some enrollment projections.” (Steffan at 830.) Ms. Miterko told the faculty members at the meeting that she “was not at liberty” to share the full budget documents. (Steffan at 831.) There has been no schedule or notice of any additional meetings for this group. (Steffan at 830.) Whatever this group may be (or may have been, since there is no indication that it will ever meet again), it does not address the financial decisions of the College and therefore does not establish any faculty control or effective recommendation in this key area of analysis.

The Budget Committee, when it did exist under the 2018 Handbook, was a forum for the College President to share information. There is no evidence that faculty had any control or effective recommendation towards the formulation or revision of the College budget. Since the suspension of the 2018 Handbook, there doesn’t seem to be a Budget Committee; the group that met and reviewed some College enrollment projections did not review or discuss the College budget, and there are no plans for the group to meet again.⁴

⁴ Both versions of Appendix 4.8 to the July 2020 Handbook purport to create a Faculty Budget Committee (or “Faculty Compensation Committee”). See, ER Exh 7 at p 10 and ER Exh 562 at p 13. That no such committee has

C. Medaille Has Not Met Its Burden To Demonstrate That Faculty Exercise Actual Control Or Effective Recommendation In Areas Of Secondary Decision Making.

For the purposes of establishing managerial status for faculty at a college or university, the party asserting managerial status for such employees must show actual control or effective decision making in areas of primary and/or secondary decision making. *Pacific Lutheran University*, 361 NLRB at 1420-21. Areas of secondary decision making include Academic Policy and Personnel Policy and Decisions. *Id.* at 1421. These areas are “less important” than areas of primary decision making. *Id.* at 1420. Parties asserting managerial status for college faculty not only carry the burden to establish such status, but also “must prove actual – rather than mere paper – authority.” *Ibid.* There must be “specific evidence or testimony regarding the nature and number of faculty decisions or recommendations in a particular decisionmaking area, and the subsequent review of those decisions or recommendations, if any, by the university administration prior to implementation, rather than mere conclusory assertions that decisions or recommendations are generally followed.” *Ibid.*

As is the case with areas of primary decision making, Medaille has not established that its faculty exercise such control or effective recommendation in areas of secondary decision making, chiefly because there currently exists no body or official vehicle for faculty to exercise such control or effective recommendation. Such bodies did exist, at least on paper, by operation of the 2018 Handbook, which is no longer in place and which has not been effectively replaced. See, Point I. A. “Medaille Does Not Rely On The Professional Judgment Of Its Faculty To Formulate And Apply Crucial Policies,” *supra*.

met nor reviewed faculty compensation or the College budget during the 2020-21 academic year supports the conclusion that no official Faculty Committees exist. See, Point I, A, “Medaille Does Not Rely On The Professional Judgment Of Its Faculty To Formulate And Apply Crucial Policies,” *supra*.

However, even if the 2018 Handbook were somehow still in place, with all its language that purportedly creates and maintains shared governance between the faculty and administration, it still does not prove actual, rather than mere paper, authority for the faculty. Meanwhile, in every key area of analysis, the record demonstrates that actual authority rested with administration during the times that the 2018 Faculty Handbook was in effect. Or, at the very most, the record is unclear as to whether the faculty or administration held actual authority or whether the faculty offered effective recommendation to the College. Thus, assuming that the time period during which the 2018 Faculty Handbook was not made completely irrelevant by the suspension and elimination of said handbook in April 2020, then the College has nevertheless failed to meet its burden to demonstrate managerial authority by the faculty.

1. Medaille Has Not Met Its Burden To Demonstrate That Faculty Exercised Actual Control Or Effective Recommendation In Academic Policy.

An analysis of decision making in the area of Academic Policy “covers topics such as teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy.” *Pacific Lutheran University*, 361 NLRB at 1420. These areas are “not as central to the institution’s offerings as the primary decision making area of academic programs.” *Ibid*.

Academic Policies were, prior to the 2020-21 academic year, published annually in the graduate and undergraduate course catalogs. (ER Exh 3; ER Exh 6; Macur at 34; Steffan at 845.) Course catalogs are generally released in August prior to the start of the academic year. (Steffan at 846.) There were no course catalogs for the 2020-21 academic year prior to the filing of the Petition in this matter. (Macur at 36, Steffan at 846.) Consequently, academic policies were either unavailable or else were simply not in place for the start of the 2020-21 academic year.

(Villaseñor at 1562-63; Steffan 846; see also, Point I. A. “Medaille Does Not Rely On The Professional Judgment Of Its Faculty To Formulate And Apply Crucial Policies,” *supra*.)

Course catalogs for the 2020-21 academic year were eventually put into place by the College on or about October 7, 2020; after the Petitioner filed its Petition with the NLRB and just in time for the Employer to introduce them as exhibits in this matter. (Macur at 581; ER Exhs 408 and 409.) The fact that the course catalogs – and the academic policies contained therein – can be unilaterally held in abeyance by the College with no input by the faculty and by no documented policy or procedure – demonstrates that the faculty currently has control or effective recommendation with respect to Academic Policy.

However, even if the 2020-21 course catalogs were in place during the start of the 2020-21 academic year, the evidence on the record demonstrates that the faculty had neither control nor effective recommendation over the Academic Policies contained therein. Prior to April 27, 2020, Academic Policies were addressed in various faculty committees, such as the UCC, GPC, and UEPC. (Villaseñor at 1447; Kotzin at 1228.) As has been demonstrated earlier, the faculty did not exercise control nor effective recommendation through the UCC, GPC, nor UEPC. See, Point I. B. 1. “Medaille Has Not Met Its Burden To Demonstrate That Faculty Exercised Actual Control Or Effective Recommendation In Academic Programs,” *supra*.

Furthermore, even if the faculty had exerted some measure of control or effective recommendation over Academic Policies, such policies were not always followed by the College. (Steffan at 983.) Sometimes, Academic Policies were set independent of the faculty committees. (Steffan at 988.) In some instances, when faculty attempted to give input into key Academic Policies such as with course outlines or syllabi within a department, the administration would completely ignore such input, dismissing it as “too much work.” (Villaseñor at 1473-77.)

Consequently, even when course catalogs existed at the College, the faculty were not able to exercise any control or effective recommendation towards Academic Policies, either through faculty committees or through individual faculty efforts.

2. Medaille Has Not Met Its Burden To Demonstrate That Faculty Exercised Actual Control Or Effective Recommendation In Personnel Policy and Decisions.

An analysis of decision making in the area of Personnel Policy and Decisions includes “hiring, promotion, tenure, leave, and dismissal... .” *Pacific Lutheran University*, 361 NLRB at 1420. Prior to April 27, 2020, such issues were governed by the 2018 Faculty Handbook. (P Exh 1 at 3-68.) The 2018 Faculty Handbook was suspended and eliminated by the College, without regard to any published policy and procedure, and without any input from the faculty. See, Point I. A., “Medaille Does Not Rely On The Professional Judgment Of Its Faculty To Formulate And Apply Crucial Policies,” *supra*. The fact that the College can unilaterally eliminate every personnel policy is, by itself, proof that the faculty have no control or effective recommendation with respect to Personnel Policy and Decisions.

Furthermore, the College believes that it has instituted a replacement faculty handbook; the July 2020 Handbook. (ER Exh 5.) This too was done unilaterally by the College, with no regard to any published policy or procedure, and with no faculty input, control, or effective recommendation. See, Point I. A., “Medaille Does Not Rely On The Professional Judgment Of Its Faculty To Formulate And Apply Crucial Policies,” *supra*. Even if the July 2020 Handbook truly exists and as in force at the College, it does not apply to any faculty members. Specifically, according to its own provisions, the July 2020 Handbook does not apply to any faculty member that fails to sign an employment agreement. (ER Exh 5 at p 3.) Such employees are, according to the July 2020 Handbook, “at-will” employees, and “no at-will employee shall claim any right

or benefit under the Faculty Handbook.” (*Ibid.*) No faculty member signed an employment agreement. (P Exh 50; Steffan at 764; Kotzin at 1173.) Therefore, according to the record and by definition of “at-will,” every faculty member is an at-will employee with no right to tenure, promotion, or leave, and with no protection from dismissal. Such employees can not exert any control or effective recommendation over Personnel Policies or Decisions.

However, even if there were any evidence anywhere in the record that even a single faculty member signed a requisite employment agreement, there is no clear indication that the faculty, as a body, exerts any control or effective recommendation over Personnel Policies or Decisions for such employees. Sabbatical Leave is governed by section 4.6 subsection B of the July 2020 Handbook. (ER Exh 5 at p 18.) There is no mention of any role of any faculty sabbatical committee in the procedures for a faculty member to request such leave. (*Ibid.*; Macur at 623.) Promotion Policies are governed by section 4.2 subsection A of the July 2020 Handbook. (ER Exh 5 at p 7.) There is no mention of any faculty promotion or promotion and tenure committee; the “final determination of a promotion to a different rank will be made by the Board of Trustees.” (*Ibid.*; Macur at 630.) There is nothing in the July 2020 Handbook regarding the resolution of faculty grievances, except for a procedure limited only to issues of academic freedom and expressly does not cover Personnel Policies or Decisions. (ER Exh 5 at p 2; Macur at 637.)

The various version of Appendix 4.8 that were published by the College since July 2020 do make reference to faculty committees such as the promotion committee, grievance committee, and sabbatical leave committee. (ER Exh 7; ER Exh 562.) Ignoring for a moment that there is no evidence in the record that either version of Appendix 4.8 is actually valid or in effect, and ignoring for a moment that there is no evidence in the record that any of the at-issue committees

are officially in existence or functioning at the College, there also no evidence that resolves the conflict regarding such mention of the committees and the provisions of the July 2020 Handbook. See, Point I. A., “Medaille Does Not Rely On The Professional Judgment Of Its Faculty To Formulate And Apply Crucial Policies,” *supra*. Specifically, if the “final determination of a promotion to a different rank will be made by the Board of Trustees,” as is stated in the July 2020 Handbook, then what role would a hypothetical Promotion Committee serve? (ER Exh 5 at p 7; ER Exh 562.) Similarly, what role would a hypothetical grievance committee serve if grievances regarding “compensation, promotion, job duties, hiring decisions, appointments, layoffs, discipline, termination or allegations of harassment” were explicitly barred, as is the case in the July 2020 Handbook? (ER Exh 5 at p 2; ER Exh 562.) At best, and after ignoring a great deal of evidence that demonstrates that neither the July 2020 Handbook nor any version of any appendix thereto is in effect or otherwise applies to any faculty member, the record is unclear about what role, if any, the faculty might play in the control or effective recommendation of Personnel Policies or Decisions.

POINT II

NONE OF THE PETITIONED-FOR EMPLOYEES ARE SUPERVISORS.

Section 2(11) of the National Labor Relations Act excludes “supervisor” from the protection of the Act, and defines supervisor as “any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances.” 29 U.S.C. § 152(11). “[I]ndividuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., ‘assign’ and ‘responsibly to direct’) listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but

requires the use of independent judgment; and (3) their authority is held in the interest of the employer.” *The Arc of South Norfolk*, 368 NLRB No. 32 (2019), quoting *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

The burden of proof rests with the party asserting supervisory status. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). “[P]urely conclusory evidence is not sufficient to establish supervisory status.” *Lynwood Manor*, 350 NLRB 489, 490 (2007). Evidence which is “limited very largely to the administrator’s general assertions” is not sufficient to establish supervisory authority. *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1467 (7th Cir. 1983); see also *G4S Regulated Security Solutions*, 358 NLRB 1701, 1702 (2012), and *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 305 (6th Cir. 2012)(“[g]eneral testimony asserting that employees have supervisory responsibilities is not sufficient to satisfy the burden of proof when there is no specific evidence supporting the testimony”).

Petitioner has petitioned for, among other titles, a unit which includes “Library Director,” and “those full-time and regular part-time faculty who are Department Chairs and Program Directors.” (Board Exh 5.) Among its objections, the Employer seeks to exclude from any recognized unit three job titles within the petitioned-for unit: the Department Chairs, Program Directors, and Library Director. (Board Exh 3.) As is set forth more clearly below, the Employer has not met its burden to show that Department Chairs, Program Directors, nor the Library Director are supervisors as defined by the Act.

Both versions of Appendix 4.8 to the July 2020 Handbook articulate the powers and duties of Academic Department Chairs, Program Directors, and the Library Director. (ER Exh 7 at pp 2-7; ER Exh 562 at pp 4-8.) Neither version of Appendix 4.8 are currently in force at the

College. See, Point I. A., “Medaille Does Not Rely On The Professional Judgment Of Its Faculty To Formulate And Apply Crucial Policies,” *supra*. Furthermore, the entire employment relationship between the faculty and the College changed on April 27, 2020 when Medaille unilaterally suspended and eliminated the 2018 Faculty Handbook. See, *ibid*. Consequently, the record is not clear about what roles and responsibilities Department Chairs, Program Directors, nor the Library Director have at the College since it is impossible to tell exactly what such roles and responsibilities are. Had either version of Appendix 4.8 been in effect or apply to any sitting Department Chair, Program Director, or Library Director, then an analysis could be done regarding what the listed duties are in either appendices and their similarities or differences with how such duties were carried out prior to April 27, 2020. As it is, there is no governing document in place for Department Chairs, Program Directors, nor the Library Director, so it is impossible to know what actual duties those with such job titles actually have. The Employer has not and can not meet its burden to show that Department Chairs, Program Directors, nor the Library Director are supervisors. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687.

Had Medaille not unilaterally suspended and eliminated the 2018 Handbook, or had any of the Department Chairs, Program Directors, or the Library Director signed employment agreements that might possibly subject them to the authority of the July 2020 Handbook and its appendices, then an analysis of the past duties of those with such job titles would nevertheless demonstrate that they didn’t rise to the level of supervisor as defined by the Act.

1. Department Chairs Were Not Supervisors.

There are seven academic departments, each had its own chair. (ER Exh 2.) Department Chairs were generally elected by their department. (Macur at 710.) There were times when a Department Chair was appointed rather than elected. (Kotzin at 1121.) The election of

Department Chairs had been be over-ridden by the VPAA. (Macur at 711.) The record is unclear as to how often that happened. (Macur at 711.)

Department Chairs maintained the department schedule, ran department meetings, shared with other faculty in the evaluation process, and made recommendations. (Horne-Moyer at 1313.) Agendas for department meetings were set by the Chair requesting agenda items from department members. (Steffan at 1017.) Department Chairs generally did not have final decision-making authority. (Horne-Moyer at 1314.) Chairs would assist the administration in the recruitment of adjunct faculty, generally through staffing requests to the Academic Affairs office. (*Ibid.*) Chairs did not have final decision-making authority over the hiring or firing of adjunct faculty. (Horne-Moyer at 1314; Steffan at 1035.) Recommendations by the Chair for the hiring of adjunct faculty were, at times, rejected. (Horne-Moyer at 1315; Steffan at 1035, 1039.) Sometimes, the College would engage in the recruitment of adjunct faculty without any requests by Chairs and without any input from the Chairs. (Steffan at 754; P Exh 10; P Exh 11.) Department Chairs, therefore, did not hire adjunct faculty nor did they effectively recommend the hiring of adjuncts.

There is nothing in the record that supports the conclusion that Department Chairs could ever fire adjuncts, nor any other employee. When adjuncts were hired by the College, they went through a training course “we call it Faculty 101,” went through the personnel department, and then entered a kind of “pool” of adjuncts. (Steffan at 1030-31.) The entire academic department would then review adjuncts in the pool to determine if they were adequate for teaching classes within the department. (Steffan at 1031-32.) Department recommendations for the use of adjuncts must be approved by the VPAA. (Steffan at 1032.) Not all recommendations were followed by the VPAA. (Steffan at 1035, 1047-48.) A department’s failure to positively

recommend an adjunct had no impact on the adjunct's employment status; they still remained in the adjunct pool and were used by other departments. (Steffan at 1109.)

Department Chairs made recommendations to administration to add new full-time positions to their department. (Horne-Moyer at 1317; P Exh 60.) Those recommendations were not always approved by the VPAA. (Horne-Moyer at 1321; P Exhs 61, 62, 63.) Sometimes, recommendations for new positions were unilaterally modified by the VPAA and then approved in a manner different from what the Chair had recommended. (Horne-Moyer at 1327-29.)

Department Chairs and other faculty were involved in search committees in order to fill full-time positions. (Steffan at 745; Kotzin at 1246; Horne-Moyer at 1399.) Recommendations by Department Chairs regarding the nature of search committees, such as changing a search from a tenure-track position to a non-tenure-track position, were sometimes rejected by the VPAA. (Steffan at 746-48.) Search committees were sometimes cancelled by the VPAA. (Steffan at 817.) Search committees did not have any say or engage in any negotiation with candidates as to the salary or benefits that the potential candidate would receive. (Steffan at 1107-08.) The ultimate recommendations of search committees were subject to independent review by administration. Specifically, candidates would first interview with the search committee, but if successful, would then move on to interviews with the College President, the VPAA, and even perform a teaching demonstration in front of students. (Steffan at 933.) The Board has determined that college faculty do not effectively recommend hiring where, as here, the results of a search committee are independently reviewed by administration. *University of Great Falls*, 325 NLRB at 97.

Chairs played a role in the faculty evaluation process, but did not actually evaluate faculty. Specifically, faculty members completed a self-evaluation, which the Chair reviewed

and commented on. (Steffan at 1071.) Ultimate employment decisions were not made by the College based solely on the faculty self-evaluations nor the Chairs comments on such evaluations. (Steffan at 1072.) In fact, when a Chair voiced an opinion to not renew a faculty member, her opinion was rejected by the VPAA, and she was instructed to modify her documentation regarding the evaluation process. (Steffan at 770-779; P Exhs 19, 20, 21, 22.) This calls into question any and all documentation regarding the role Department Chairs played in the faculty evaluation process, as it is impossible to tell which or how many of the evaluations signed by the Chairs were modified per the instruction of the VPAA.

Chairs made recommendations regarding the renewal of faculty members. (Horne-Moyer at 1329.) Such recommendations were not always followed by the administration. (Horne-Moyer at 1330-31.) Chairs were sometimes involved in the non-renewal process for faculty; often through documenting the process. (Horne-Moyer at 1331.) Such documentation was performed according to a sort of script supplied by the administration, and/or the Chair was directed to modify such documentation. (*Ibid.*) Such a role, then, was merely clerical, and did not rise to the level of supervisory. *The Arc of South Norfolk*, 368 NLRB No. 32 (2019).

Department Chairs would facilitate the creation of a class schedule for the department. (Steffan at 1020.) The creation of the schedule was generally collaborative, with the Chair soliciting ideas about possible changes to the schedule from the members of the department. (*Ibid.*) The department schedule was ultimately sent to the Registrar and Academic Advising, which had the power to reject or demand changes to department schedules. (*Ibid.*) The Board has found that employees which are responsible for setting schedules for co-workers are not supervisors where, as here, such employees “set the schedules cooperatively” with the co-workers and “any modifications [were] made exclusively on a voluntary basis.” *Edward Street*

Daycare Center, Inc. v. NLRB, 189 F.3d 40, 50 (1st Cir. 1999); see also, *Hospital General Menonita*, 393 F.3d 263, 267 (1st Cir. 2004); *Frenchtown Acquisitions Co., Inc. v. NLRB*, 683 F.3d 298, 311-12 (6th Cir. 2012).

Department Chairs played a role in their department's budget. (Horne-Moyer at 1332.) Such budgets did not include staffing costs, but rather items like accreditation expenses, instructional materials, office supplies, and possibly catering. (Steffan at 1059-60.) A Chair's role was limited to revising the previous year's budget to fit targets set by the administration. (Horne-Moyer at 1332; Steffan at 1058.) Chairs had no say in the amount of money was in the department budget. (Steffan at 1066.) Any changes to the department budget had to be approved by administration. (Steffan at 1061.) Such a role, then, was merely clerical, and did not rise to the level of supervisory. *The Arc of South Norfolk*, 368 NLRB No. 32 (2019).

2. Program Directors Were Not Supervisors.

There are roughly thirty different academic programs offered at Medaille. (Macur at 20.) "Programs" are generally academic majors or minors, but in some circumstances, such as with the College honors program, can be independent of a major or minor. (Macur at 22.) Most, but not all, of the programs exist within an academic department. (ER Exh 2.) Academic departments were headed by Department Chairs; programs were headed by Program Directors. (*Ibid.*) Program Directors were appointed by the VPAA. (Steffan at 1023.)

The job duties of Program Directors varied widely based on which academic department it was associated with, if any. (Villaseñor at 1484.) Program Directors might have worked with the academic advising office to inform them of program requirements. (Kotzin at 1207.) Program Directors also might have worked with students enrolled in their programs as a sort of advisor; sometime to resolve student problems. (Kotzin at 1207, 1273; Steffan at 1025-26).

Program Directors also may have tried to resolve problems that adjuncts had. (Steffan at 1026). Program Directors that addressed problems adjuncts had, but could not resolve such issues with either students or adjuncts, passed the issue along to someone else, often the Department Chair. (Steffan at 1025-26).

Department Chairs would sometimes recommend to the VPAA members of the department to be Program Directors, which was often like “begging” for someone to be willing to be a Program Director, because Chairs often didn’t “have choices.” (Steffan at 1024.) Recommendations were not necessarily based on who would be the “best fit,” but rather who was willing. (Steffan at 1025.) It is unclear who would, if anyone, recommend Program Directors for programs that were not within an academic department.

Program Directors worked collaboratively with faculty members and adjuncts within the program in order to build class schedules. (Steffan at 1020-21; Villaseñor at 1495-96.) Class schedules that were established by Program Directors had been overruled by the VPAA. (Villaseñor at 1497-98, 1503.) The Board has found that employees which are responsible for setting schedules for co-workers are not supervisors where, as here, such employees “set the schedules cooperatively” with the co-workers and “any modifications [were] made exclusively on a voluntary basis.” *Edward Street Daycare Center, Inc. v. NLRB*, 189 F.3d 40, 50 (1st Cir. 1999); see also, *Hospital General Menonita*, 393 F.3d 263, 267 (1st Cir. 2004); *Frenchtown Acquisitions Co., Inc. v. NLRB*, 683 F.3d 298, 311-12 (6th Cir. 2012).

Some programs – although how many is unclear – were eliminated with students still in them, so the Program Director stayed on to “teach out” such students that were already in the program. (Steffan at 1022.)

In some departments, Program Directors recommended adjunct faculty members to teach classes within the program. (Steffan at 1029-30.) These recommendations were from an existing pool of hired and trained adjuncts. (Steffan at 1030.) Typically, the Program Director simply approached someone who had taught the class in the past. (Steffan at 1034.) The adjunct was then approved by the Department Chair and then the VPAA. (Steffan at 1031-32.) Neither Department Chairs nor Program Directors hired adjuncts; only the VPAA could hire and appoint adjuncts. (Steffan at 1035.) Department Chairs did not always accept the recommendations of Program Directors for using adjunct faculty. (Steffan at 1036-37.) The VPAA did not always accept department or program recommendations on adjuncts. (Steffan at 1035, 1039.) Obviously, the recommendations made by some adjuncts were subject to the independent review of both the Department Chair and the VPAA. Such recommendations are insufficient to establish supervisory status under the Act. *University of Great Falls*, 325 NLRB at 97.

Some Program Directors had no involvement at all with adjunct faculty. (Kotzin at 1276.) The record is unclear as to which or how many Program Directors had no involvement with adjunct faculty. In one department, Program Directors mentored adjuncts. (Villaseñor at 1504.) Such mentoring included classroom observations and observation forms that were shared with the adjunct. (Villaseñor at 1506.) This was done to help adjuncts improve their teaching. (*Ibid.*) In one other department, Program Directors were available to answer adjunct questions, and possibly bring adjunct concerns to Department Chairs. (Steffan at 1040-41; 1049.)

In one program, Program Directors played a role in the faculty self-evaluation process for faculty in their program. (Villaseñor at 1512.) There is no indication that Program Directors in other programs played similar roles.

Some Program Directors had no role in recruiting adjuncts. (Steffan at 1030.) In other departments, Program Directors might have made suggestions to Department Chairs regarding the recruitment of adjuncts. (Villaseñor at 1314.) The record is unclear as to which or how many specific Program Directors played any role in the recruitment of adjuncts or what that role was. Program Directors did not formally evaluate adjuncts, but rather were available to adjuncts to “answer any questions” and to “be available if [adjuncts] have any concerns.” (Steffan at 1040.)

As a threshold matter, the Employer has failed to meet its burden to show that Program Directors were supervisors under the Act, because the record demonstrates a wide range of job responsibilities, depending on which academic department or program that the Program Director was affiliated with. So, while some Program Directors had roles with monitoring, mentoring, and choosing adjuncts for their program, other had no involvement with adjuncts whatsoever. (Kotzin at 1276.) Petitioner notes that the Employer could have brought specific evidence regarding the job responsibilities of each individual Program Director at the College, but chose not to. Thus, as a single job title, the record is far from clear on what job responsibilities every Program Director has. So no matter what those job responsibilities were, or if any of those responsibilities may have elevated one or more Program Directors to the level of a supervisor, Employer has failed to meet its burden to show that Program Directors, as a singular title, is supervisory. *Oakwood Healthcare, Inc.*, 348 NLRB at 687. Employer’s evidence regarding the entire job title is, at best, speculative and conclusory, and thus insufficient to meet its burden. *Lynwood Manor*, 350 NLRB at 490.

Meanwhile, the record indicates that no Program Director has job duties sufficient to raise them to the level of supervisor under the Act. Every job function that one or more Program

Director may have that might indicate supervisory status, such as recruiting adjuncts, observing adjuncts, or recommending an existing adjunct employee to teach a class were subject to independent review, and thus not truly supervisory. *University of Great Falls*, 325 NLRB at 97. Other duties that some of the Program Directors had, such as helping to create class schedules, were done collaboratively with the adjuncts, which does not rise to the level of supervisory. *Edward Street Daycare Center, Inc. v. NLRB*, 189 F3d at 50; *Hospital General Menonita*, 393 F.3d at 267; *Frenchtown Acquisitions Co., Inc. v. NLRB*, 683 F.3d at 311-21.

3. There Is Insufficient Evidence To Show That The Library Director Was A Supervisor.

President Macur offered testimony regarding the nature of what the Library Director's duties were, chiefly by testifying from the list of job duties found in one version of Appendix 4.8. (Macur at 156-59.) No testimony was given at the hearing from the Library Director. President Macur's testimony is vague and conclusory regarding the job responsibilities of the Library Director and are insufficient to establish that the Library Director is a supervisor. "[P]urely conclusory evidence is not sufficient to establish supervisory status." *Lynwood Manor*, 350 NLRB at 490. Evidence which is "limited very largely to the administrator's general assertions" is not sufficient to establish supervisory authority. *NLRB v. Res-Care, Inc.*, 705 F.2d at 1467; *G4S Regulated Security Solutions*, 358 NLRB at 1702; *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d at 305.

The scant documentary evidence produced at the hearing regarding the Library Director was the result of a 2018 search committee from the Library Director acting as the Search Committee Chair, and a Position Approval Form from 2018 for the Rochester Campus Library Coordinator. (ER Exh 34; ER Exh 79.) As has been shown previously, faculty search committees are subject to the independent review and approval of College administration. See,

Point I. B. 1., *supra*. The Board has determined that college faculty do not effectively recommend hiring where, as here, the results of a search committee are independently reviewed by administration. *University of Great Falls*, 325 NLRB at 97.

Consequently, there is insufficient evidence that the Library Director is a supervisor under the Act.

CONCLUSION

As demonstrated above, the Employer has not met its burden to show that the faculty at Medaille College are managerial, nor has it met its burden to show that the Department Chairs, Program Directors, and/or Library Director are supervisors. Petitioner respectfully requests that Region 3 of the National Labor Relations Board immediately issue a Decision and Notice of Election in this matter.

November 12, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Employer Name: Medaille College

Case No. 03-RC-265905

I hereby certify that on November 12, 2020, a copy of the Post-Hearing Brief of Medaille College was served on petitioner's representatives John Lichtenthal and Elizabeth Vignaux by e-mail at the following email addresses designated for such service: John.Lichtenthal@nysut.org;
Elizabeth.Vignaux@nysut.org.

/s/ James R. Grasso

NATIONAL LABOR RELATIONS BOARD

In the Matter of:

MEDAILLE COLLEGE,

Employer,

Case No. 03-RC-265905

and

MEDAILLE COLLEGE FACULTY
ASSOCIATION/NYSUT/AFT/NEW/AFL-CIO,

Petitioner.

POST-HEARING BRIEF OF MEDAILLE COLLEGE

I. PRELIMINARY STATEMENT

The petition seeking certification of the Medaille College Faculty Association (Union) as the bargaining agent for the full-time faculty at Medaille College (Medaille or College) should be dismissed because Medaille's entire full-time faculty are managerial employees and, therefore, excluded from coverage under the National Labor Relations Act, 29 U.S.C. § 15_, *et seq.* (Act). Moreover, should it be determined that the entire faculty are not managerial employees, Medaille's Department Chairs and Program Directors should nonetheless be excluded from the bargaining unit because their duties qualify them as supervisors under the Act.

Medaille operates under a model of shared governance which vests effective control over its academic programs, academic policies and personnel decisions in its full-time faculty, matters which are unquestionably managerial. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980). The full-time faculty's authority extends, but is not limited to, effectively determining Medaille's curriculum, grading system, admissions and matriculation standards and course schedules, controlling the hiring and termination of full-time and adjunct faculty and administrative personnel, and deciding whether to grant promotions and sabbaticals. In addition, Medaille's Department Chairs and Program Directors exercise supervisory authority in carrying out their responsibilities, including hiring and firing adjunct faculty, evaluating all full-time and adjunct faculty in their departments and programs, scheduling and assigning courses, and administering budgets.

II. BACKGROUND

Medaille was founded in Buffalo in 1875 by the Sisters of St. Joseph as Mount St. Joseph Institute to prepare its members to be teachers in the public and private schools in

Buffalo. Tr. 16-17.¹ Medaille adopted its current name in 1967. *Id.* Medaille operates a main campus in Buffalo, New York and a satellite campus in Rochester, New York, along with an online learning program. *Id.* The College offers approximately 30 undergraduate academic programs and graduate programs in psychology, education, clinical and mental health counseling, marriage and family therapy and business. Tr. 20; ER. 1, ER. 408 and 409.² Ultimate responsibility for managing Medaille rests with its board of trustees, which selects its president who is its chief executive officer. Tr. 19-20. Dr. Kenneth Macur is Medaille's current president. Tr. 15. The administration of Medaille is broken into six areas - Academic Affairs, College Relations, Student Development, Enrollment and Marketing, Business and Finance and Human Resources. ER. 23. Medaille's Vice President for Academic Affairs is its Chief Academic Officer. Tr. 127. Medaille has approximately 70 full-time faculty members and 250 adjunct faculty member. Tr. 22, ER. 2.

Medaille operates under a model of shared governance which vests in the full-time faculty responsibility for its curriculum and academic policies, as well as personnel decisions related to full-time and adjunct faculty members. *See, e.g.*, Tr. 159-60; ER. 562 (Appendix 4.8 - Faculty and Academic Governance), pp. 7 ("The faculty has paramount responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, the creation, modification, or deletion of departments and programs, faculty selection decisions, and those aspects of student life that relate to the educational process."). The full-time faculty are represented in the shared governance model by a Faculty Assembly which consists of all full-time faculty members. Tr. 28, 161; ER.

¹ References in the form "Tr. ___" refer to the cited page of the hearing transcript.

² Reference in the form "ER. ___" refer to the cited Employer exhibit admitted into evidence at the hearing.

562, p. 8. The Faculty Assembly elects a Faculty Council which acts as the executive body of the Faculty Assembly and represents the views of the faculty. Tr. 28-29, 161; ER 562, p. 8. The Faculty Assembly elects and appoints full-time faculty to the several faculty committees existing at the College. ER. 562; Tr. pp. 10-17.

Medaille's academic policies are contained in its undergraduate and graduate catalogs. ER. 408 and 409.

III. ARGUMENT

POINT I

MEDAILLE'S FULL-TIME FACULTY ARE MANAGERIAL EMPLOYEES EXEMPT FROM THE ACT

The controlling case in this matter is *Yeshiva Univ.*, 444 U.S. 672, in which the Supreme Court held that Yeshiva University's full-time faculty were managerial employees exempt from the Act because of the faculty's "extensive control" over academic and personnel decisions. In *Yeshiva Univ.*, the Supreme Court reasoned that the full-time faculty exercised managerial authority because they effectively determined, among other things, the university's curriculum, grading system, admission and matriculation standards, and course schedules and that the overwhelming majority of the faculty's recommendations as to faculty hiring, tenure, sabbaticals, termination and promotion were implemented. *Id.* at 686.

In *Elmira College*, 309 NLRB 842, 143 LRRM 1071 (1992), the National Labor Relations Board ("Board") affirmed the Regional Director's Decision and Order dismissing the petition for an election among the college's faculty, holding that the Regional Director correctly applied the holding in *Yeshiva Univ.* in finding that Elmira College's faculty were managerial employees. The Regional Director found that Elmira College's faculty

effectively controlled the college's academic affairs and exercised significant authority in non-academic managerial functions as well through their participation in various faculty committees whose recommendations were routinely adopted by the college's administration. For instance, the Elmira College faculty participated in the governance of the college by controlling the acceptance of students through the college's educational standards committee that set the standards for automatic acceptance of applicants; determining the courses to be offered and their content; making recommendations about which major and minor subjects of study to offer; and setting student academic retention and discipline standards. In non-academic matters, the Elmira College faculty, through the faculty search committee, effectively interviewed and hired new faculty and also exercised authority to hire part-time or adjunct faculty. The Elmira College faculty, through the faculty review committee, also effectively made decisions regarding the granting of tenure and promotion in rank.

The Board most recently addressed the managerial status of university and college faculty in *Pacific Lutheran Univ.*, 361 NLRB 1404, 202 LRRM 1001 (2014), where the Board, in ruling on a petition filed by contingent or adjunct faculty members, not full-time faculty members. In *Pacific Lutheran Univ.* the Board clarified the relevant areas of decision making at colleges and universities to be considered and their relative weight in determining if faculty constitute managerial employees and divided the areas into two categories: primary areas of decision making and secondary areas of decision making. Primary areas of decision making include academic programs, enrollment management and finances. *Id.* at 1420. Secondary areas of decision making include academic policy and personnel policy and decisions. *Id.*

A review of the evidence entered into the record during the hearing shows determinatively that Medaille's full-time faculty exercise effective control over Medaille's academic programs, academic policies and personnel decisions to such an extent so as to constitute managerial employees exempt from the Act.

A. The Full-time Faculty Effectively Control Medaille's Academic Programs

Pursuant to Appendix 4.8 (Faculty and Academic Governance) to the Medaille College Policy Manual - Faculty Handbook/Volume IV, Medaille's full-time faculty has paramount responsibility for both the undergraduate and graduate curricula, which the faculty exercises through the Undergraduate Curriculum Committee (UCC) and Graduate Program Council (GPC), respectively. Tr. 27, 159-60; ER. 562, p. 7. The processes by which the UCC and GPC control the undergraduate and graduate curriculum are contained in the Undergraduate Curriculum Manual and Graduate Program Manual, respectively. Tr. 183-89; ER. 8 and ER. 9. Through the UCC and GPC the full-time faculty effectively control the undergraduate and graduate curricula by, among other things, proposing, reviewing and approving all courses and programs of study, determining which major and minor courses of study and programs to offer, determining the course requirements for subject majors and programs, and determining course content. Tr. 48-49, 66, 73-75, 142, 341-58.

The record is replete with examples of the UCC and GPC's recommendations concerning matters affecting the undergraduate and graduate curricula and their virtual universal approval by Medaille's VPAA. *See* ER. 55 (approval of new Social Justice program); ER. 57 and 60 (modification of Marriage and Family Therapy program); ER. 59 (addition of new eSports program); *see also* ER. 127-407 (UCC and GPC Cover Action

Sheets approving various curriculum changes proposed by the faculty); Tr. 123-24 (testimony of Dr. Macur that Medaille approved the request of the Business Department faculty to reduce the number of credit hours to obtain an MBA from 48 to 36 in 2018).

The evidence submitted by Medaille regarding the faculty's effective control over the undergraduate and graduate curricula was substantiated by the petitioner's witnesses. *See* Tr. 960-68 (testimony of Susan Steffan acknowledging she has brought proposed curriculum changes to the GPC and that the GPC changed the credit hour requirements to obtain an MBA, which Medaille approved); Tr. 994-94 (testimony of Susan Steffan that faculty determine which courses to teach, course content and the requirements to satisfy the requirements for a major course of study); Tr. 1258-60 (testimony of Daniel Kotzen that the faculty determines the requirements for a major); Tr. 1391-93 (testimony of Helen Lynn Horne-Moyer that changes to the curriculum originate with the faculty of a department, are presented to the GPC, the GPC votes to approve proposals and the VPAA then approves them).

Medaille's full-time faculty also effectively control the curricula by having authority to approve course equivalents for articulation agreements entered into with educational institutions and approving or denying transfer credit from other institutions. Tr. 436-44; ER. 88-93. Again, the petitioner's witnesses confirmed the faculty's effective control over approving course equivalents in Medaille's articulation agreements and transfer credit. Tr. 1007-08, 1112-13 (Sue Steffan testifying that she reviewed and approved course equivalent determinations for articulation agreements and for transfer credit); Tr. 1260-62 (Daniel Kotzen testifying he approved course equivalent decisions for articulation agreements and transfer credit).

By effectively controlling Medaille's undergraduate and graduate curricula the full-time faculty effectively control Medaille's "product" by controlling the educational programs Medaille offers and the organizational structure by which it provides its "product." *See Pacific Lutheran Univ.*, 361 NLRB 1404, 1420.

B. The Full-time Faculty Effectively Control Medaille's Academic Policies

Medaille's faculty has primary responsibility for all of the College's academic policies, which are contained in the Undergraduate and Graduate Catalogs. Tr. 37-38, 52-75, 96-100; ER. 3, 9, 408 and 409. The faculty exercises its control over undergraduate academic policies through the undergraduate Academic Standards Committee (UASC), Undergraduate Educational Policies Committee (UEPC) and over graduate academic policies through the GPC. Tr. 41, 114-121. As Dr. Macur testified, all of the academic policies contained in the Undergraduate and Graduate Catalogs were established by these committees and approved by Medaille. Tr. 37-38, 114-121. The academic policies established by the faculty through these committees and contained in the catalogs include, but are not limited to, the following: 1) establishing the grading system; 2) establishing the standards for repeating a course; 3) reviewing student academic progress and determining whether to place students on probation; 4) suspending students for poor academic performance; 5) dismissing students; 6) establishing the student academic integrity policy; 7) establishing admission standards; and 8) standards for graduation honors. *See* Tr. 37-41 (academic policies in the Undergraduate Catalog created by the faculty); Tr. 114-121 (the GPC plays the same role as the UASC in setting graduate academic policies); Tr. 339-41 (undergraduate admission standards established by the UEPC); Tr. 378 (UEPC responsible for undergraduate academic policies); ER 68 (minutes of UEPC held on September 11,

2020, reflecting the committee's role in setting academic policies); ER. 66 (letter from faculty member informing student of academic probation); Tr. 331-31 (faculty developed admissions rubrics used to admit graduate students); ER. 52 (faculty interview of graduate student with admission decision); ER. 53 (faculty recommendation to admit graduate student); ER. 54 (Veterinary Technology program admissions rubric established by the faculty); ER. 56 (email showing faculty direct involvement in graduate admission decisions); .

The petitioner's own witnesses confirm the faculty's responsibility for establishing academic standards. Susan Steffan admitted on cross-examination that the grade point average for admission to the graduate business program was set by the faculty and that the faculty established the current rubric used by the Medaille to make admission decisions for the program. Tr. 971-94. Ms. Steffan's testimony on this point is especially revealing about the extent of the faculty's involvement in the admission's process for her program. After admitting that the grade point average for admission was established by the faculty, she testified that at one point in the recent past the faculty were actively involved in making individual admission decisions but that over time that practice waned. Tr. 984. She then testified that sometime in the last two years the faculty of her department requested to again have more direct involvement in the graduate admission process and presented Medaille with proposed revised admission's criteria and processes which Medaille accepted and which Medaille is presently using to admit graduate business students. Tr. 984-94. Part of the current process includes the faculty personally interviewing applicants falling below the criteria set for automatic admission. *Id.*

Similarly, petitioner's witness Helen Lynn Horne-Moyer testified on cross-examination that it is the role of the GPC to make changes to the academic policies contained in the Graduate Catalog, that the admissions criteria used to admit graduate students to the Doctoral Program in Clinical Psychology are developed by the faculty and that the faculty determine the acceptable grade point average for admission into the program. Tr. 1406-07, 1411-25. Petitioner's witness Alice Villasenor also testified that it is the UEPC that recommends changes to the Undergraduate Catalog. Tr. 1560.

It was also undisputed at the hearing that the faculty interview and make the decision whether to grant or deny admission to every applicant to Medaille's Masters of Education, Clinical and Mental Health Counseling, Marriage and Family Therapy graduate programs and its Doctoral Program in Psychology.³ Tr. 106-08; Tr. 1396-97 (testimony of petitioner's witness Helen Lynn Horne-Moyer that the faculty interview all applicants to the Doctoral Program in Psychology).

C. The Full-time Faculty Are Effectively Responsible for Personnel Policies and Decisions

1. The full-time faculty elects the department chairs

It is undisputed that the full-time faculty elects all of the department chairs of Medaille's programs. Tr. 137-39, 278 (Dr. Macur); Ex. 7, § 2; 278; Tr. 915-16, 1334, 1529 (petitioner's witnesses). As discussed below in POINT II, department chairs are supervisors under the Act. Therefore, the faculty select their own supervisors. There is no greater

³ All of these programs lead to licensure by New York State and the requirement that the faculty interview each applicant is a requirement of the New York State Education Department. Tr. 106-08. However, that interviews are required by the state in no way diminishes the faculty's involvement in setting the admission standards or direct the role the faculty play those admissions decisions.

managerial authority regarding personnel policies and decisions than selecting the individuals who supervise employees. This aspect of the faculty's authority alone is sufficient to qualify the faculty as managerial employees. If the faculty were allowed to unionize here the distinction between management and labor would be erased and Medaille would be forced to completely reorganize its management structure. That is not something that the Act neither intends nor permits.

2. The full-time faculty effectively recommend the hiring of full-time and adjunct faculty members

The evidence shows overwhelmingly that the full-time faculty effectively recommend the hiring of all full-time and adjunct faculty members. The procedures for full-time faculty searches are contained in the Faculty Search Committee Manual. ER. 24. Whenever Medaille seeks to hire a new faculty member an ad hoc search committee consisting of faculty members is created and that committee is responsible for all aspects of the hiring process, from determining the position qualifications and preparing the job advertisement to reviewing resumes, interviewing candidates and making a selection recommendation. Tr. 246-46 (Dr. Macur); Tr. 920-942, 1246-55, 1399-40, 1512, 1521-24 (petitioner's witnesses). The evidence shows that the hiring recommendations of the faculty search committees have been universally accepted by Medaille. *See* ER. 27-38.

Likewise, petitioner's witnesses testified that the full-time faculty are involved in effectively selecting and hiring adjunct faculty. Susan Steffan testified that in the Business Department the entire faculty review and approve adjunct faculty for placement in the "approved adjunct pool" from which adjuncts are selected when needed. Tr. 1030-32. When an adjunct is needed in that department Ms. Steffan or a Program Director then

recommends an adjunct from the pool to the VPAA. Tr. 1030-40. Ms. Steffan testified that the VPAA regularly accepts and approves her department's adjunct selections.

3. Full-time faculty effectively recommend to retain and terminate adjunct faculty.

The Board has held that when employees evaluate other employees and those evaluations have an effect on the employment status of the employee being evaluated that the employee conducting the evaluation qualifies as managerial. *First Healthcare Corp.*, 323 NLRB 1171 (1997); *Legal Aid Society*, 324 NLRB 796 (1997). Here, the testimony of the petitioner's witnesses establishes that the full-time faculty evaluate the adjunct faculty and that those evaluations are relied on in making decisions whether to retain or terminate adjunct faculty. Tr. 1040-44 (Susan Steffan - the entire faculty of the Business Department evaluate adjunct faculty and decide whether to continue or terminate their services).

4. Full-time faculty effectively recommend whether to promote faculty and continue or discontinue their employment

Medaille's full-time faculty effectively recommend faculty members for promotion and whether to continue or discontinue their employment.⁴ Tr. 274. The evidence shows that the faculty Promotion and Tenure Committee's recommendations regarding promotion in rank and whether to continue or discontinue a full-time faculty member's employment are regularly accepted by Medaille. ER. 13, 15-22, 39. Indeed, the petitioner's witnesses Helen Lynn Horne-Moyer testified that the Promotion and Tenure Committee voted this past June 2020, to approve faculty members for promotion. Tr. 1384; *see also* ER 16 (committee recommendations) and ER. 21 (acceptance of recommendations). And the

⁴ In April 2020, Medaille eliminated tenure for those faculty who had not already received it. *See* Tr. 23.

evidence shows that Medaille accepted all of the Promotion Committee's recommendations. *See also* ER. 14 and 19 (acceptance of recommendation to deny tenure); ER. 20 (accepting recommendation to terminate employment of Dr. Stankevics); ER. 22 (letter from VPAA reappointing faculty members, including librarians, on the committee's recommendation); Tr. 274-78, ER. 39 (accepting recommendation to deny promotion to Dr. Patricko); ER. 50 (acceptance of committee recommendation not to promote Dr. Bowker).

5. The full-time faculty effectively recommend whether to grant or deny sabbaticals

Faculty sabbaticals are effectively recommend by the Sabbatical Committee whose recommendations are routinely accepted. Tr. 90-91, 189-95; ER. 10-12 (sabbatical recommendations and approvals for 2018-2020).

6. The full-time faculty award professional development funds to faculty members

The faculty also exercises managerial authority by making decision about how to allocate professional development funds. The Faculty Development Committee has full authority to award faculty members funds to pursue professional development activities, including for travel, conferences and other activities, that is not subject to further review or approval by Medaille. Tr. 88-92; ER. 562, pp. 12-13.

7. The full-time faculty are responsible for hiring administrative staff

The evidence shows that the full-time faculty also recommend the hiring of departmental non-instructional administrative staff and that those recommendation are routinely accepted. Tr. 288-327; ER. 41-49 (search recommendations for administrative staff showing faculty involvement in the search and selection process). The petitioner's

witness Susan Steffan confirmed that administrative staff are hired by a committee consisting of a majority of the department's faculty.⁵ Tr. 946-51.

POINT II

DEPARTMENT CHAIRS AND PROGRAM DIRECTORS ARE SUPERVISORS

In addition to being managerial employees as members of the faculty, Department Chairs ("Chairs") and Program Directors ("Directors") are supervisory employees. Chairs and Directors are the management representatives in the departments and are responsible for all aspects of operation and Chairs delegate responsibilities to Directors as they determine necessary. Tr. 136.

Section 2(3) of the Act excludes from the definition of "employee" "any individual employed as a supervisor" Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgment.

The statutory criteria are read in the disjunctive and possession of any one of the indicia listed is sufficient to make an individual a supervisor. *Providence Hospital*, 320 NLRB 717, 725, 151 LRRM 1177, 1187 (1996); *Juniper Indus.*, 311 NLRB 109, 110, 145 LRRM 1195 (1993).

⁵ Although Ms. Steffan's testimony on this point concerned the Business Department, that the faculty of her department make the decision of whom to hire for administrative staff positions demonstrates the broad authority that the faculty as a whole has over such decisions and that the faculty actually exercise that authority.

A. Chairs and Directors Evaluate Full-time Faculty

As discussed above, employees qualify as supervisors under the Act when they evaluate other employees and those evaluations have an effect on the employment status of the evaluated employees. *See, e.g., First Healthcare Corp.*, 323 NLRB 1171. Here, the record evidence show that Chairs and Directors regularly evaluate full-time faculty members and that those evaluations have an effect on the faculty's employment status.

Dr. Macur testified that Chairs and Directors evaluate the full-time faculty to ensure that they are meeting performance standards and that those evaluations are the primary means by which Medaille determines whether faculty members are performing satisfactorily. Tr. 83-87. He also testified that those evaluations are used to determine whether to place a faculty member on a development plan designed to improve their performance and to ultimately terminate a faculty member's employment. *Id.* That is, Chairs and Directors make the recommendation whether to terminate a faculty member if his or her performance does not improve after being placed on a development plan. Tr. 87.

Faculty members complete an annual self-evaluation form in which they assess their own performance and the form contains a section in which the Chair or Director then includes his or her evaluation of the faculty's member's performance. *See* ER. 410-467. In evaluating the faculty Chairs and Directors conduct classroom observations of the faculty. Tr. 608. In addition, Chairs and Directors conduct separate Periodic Performance Reviews which are conducted on all faculty at various intervals when they are being considered for reappointment and promotion. Tr. 609-11.

The petitioner's witnesses confirmed that Chairs and Directors conduct evaluate full-time faculty members and that the evaluations are used for employment-related purposes,

including whether a faculty member is placed on a performance development plan, deciding whether the faculty member's employment should be continued or terminated and whether the faculty member should be promoted. Tr. 1071-73 (Susan Steffan - testifying that as a Chair she evaluate faculty members and recommends if their employment should be continued); Tr. 1347-63 (Helen Lynn Horne-Moyer - testifying that as Chair she conducts annual faculty evaluations, classroom observations and Periodic Performance Reviews, develops performance improvement plans for underperforming faculty and recommends faculty not to renewed for employment); Tr. 1493-94, 1504-07, 1516-19 (Alice Villasenor - testifying that as a Director she evaluated faculty members).

B. Chairs and Directors Hire, Evaluate, Discipline and Fire Adjunct Faculty

As discussed above, the entire full-time faculty are effectively responsible for hiring, supervising, evaluating and firing adjunct faculty. However, should it nonetheless be determined that the faculty does not exercise such authority, the testimony of both Medaille's witnesses and the petitioner's witnesses and the documentary evidence confirms that in any case it is the Chairs and Directors who effectively hire, evaluate, discipline and fire adjunct faculty members. Medaille's Human Resources Manager, Barbara Bilotta, testified at length about the role of the Chairs and Directors in hiring adjunct faculty and explained that the Chairs and Directors have effective total control over hiring adjunct faculty. Tr. 467-533; ER. 94-111. *See RB Assoc.*, 324 NLRB 874 (1997) (Board affirmed the Regional Director's finding that an employee with the title 'painting supervisor' was a supervisor within the meaning of the Act where the employee effectively recommend the hire of three employees).

Again, the petitioner's witnesses confirmed that Chairs and Directors effectively hire, supervise, evaluate, discipline and fire adjunct faculty members. Tr. 1029-46 (Susan Steffan - Directors recommend adjuncts to her and she recommends them to the VPAA who routinely approves them, she evaluates adjuncts and makes the decision whether to discontinue adjuncts faculty and she has discipline adjuncts with "corrective action"); Tr. 1375-83 (Helen Lynn Horne-Moyer - as Chair she and the Directors of her department select and recommend adjuncts for hire every semester and those selections are regularly approved and the Directors evaluate adjuncts each semester to determine whether to continue their employment).

C. Chairs and Directors Hire, Supervise and Fire Non-Instructional Employees

Chairs and Directors also hire, supervise and fire non-instructional employees in their department and programs. Tr. 148-49, 533; ER. 112-26 (evaluations of non-instructional employees completed by Chairs and Directors).

The above duties carried out by the Chairs and Directors qualify them as supervisors under the Act. *See Detroit College of Business*, 132 LRRM 1081 (1989) (college department coordinators determined to be supervisors where with regard to part-time faculty they exercised hiring authority, evaluated faculty members, effectively recommended discharge and retention of faculty and assigned faculty); *New York University*, 221 NLRB No. 176, 91 LRRM 1165 (1975) (college's department and area chairs and program directors qualified as supervisors since they effectively recommended hiring, termination, employment during summer term and promotion of faculty, evaluated faculty performance and assigned class schedules); *Rensselaer Polytechnic Institute*, 218 NLRB No. 220, 89 LRRM 1844 (1975) (university department chairs were supervisors where they made effective hiring

recommendations, were responsible for seeing that their departments were adequately staffed, settling grievances, developing academic programs and setting priorities in their departments). The fact that an employee exercises supervisory authority over a single employee is sufficient for the employee to qualify as a supervisor within the meaning of the Act. *United States Gypsum Co.*, 93 NLRB 91 n. 9 (1951) (citing *Keystone Printing Service-Waukegan News-Sun*, 85 NLRB 157 (1949)).

POINT III

DEPARTMENT CHAIRS AND PROGRAM DIRECTORS ARE MANAGERS

Employees who “formulate and effectuate management policies by expressing and making operative the decisions of their employer” constitute managerial employees and excluded from the Act’s coverage. *Yeshiva Univ.*, 103 LRRM 2526; *accord University of Dubuque*, 289 NLRB 349 (1988); *Livingstone College*, 286 NLRB 1308 (1987). College faculty members have been found to be managerial employees excluded from the Act’s coverage where they have been responsible for organizing and leading their respective departments and formulating and effectuating management policies. *See Yeshiva Univ.*, 103 LRRM 2526. *See also University of Dubuque*, 289 NLRB 349 (department chairs were managerial employees where they were responsible for chairing department meetings, preparing course offerings and teaching assignments, preparing and administering a budget, and participating in the hiring of faculty); *Livingstone College*, 286 NLRB 1308 (department heads were managerial employees where they were, among other things, responsible for organizing and leading the department, holding meetings, ensuring courses met sequences for the majors, submitting reports and requisitions and identifying staffing needs and course descriptions).

Here, in addition to being managers as members of the faculty and being supervisors, Chairs and Directors independently qualify as managerial employees because they perform duties which have been found in the foregoing cases to confer managerial status. As listed in the jobs duties for Chairs and Directors (*see* ER. 562, pp. 2-7), they perform the following managerial duties, among others:

- developing, organizing and revising academic programs;
- planning and chairing department meetings;
- recommending the hiring of full-time faculty and non-instructional personnel;
- scheduling courses and assigning faculty and staff;
- maintaining department and program records and files;
- setting and managing a department or program operating budget; and
- preparing reports.

The testimony of both Medaille's and the petitioner's witnesses, as well as the documentary evidence, make manifest that Chairs and Directors indeed discharge duties such managerial duties. Dr. Macur testified that departments are essentially individual business units which the Chairs and Directors are responsible for managing and that their duties include, among others, developing department budgets, hiring and firing adjunct faculty, scheduling courses and assigning faculty hiring non-instructional employees. Tr. 136, 149-56, 279, 288-94, 368-70, 392-406; *see also* ER 41-49 (recommendations to hire non-instructional employees which were accepted); ER. 64-65 (acceptances of Chair recommendations to terminate and reappoint faculty members); ER. 71-77 (emails from Chairs confirming their involvement in establishing department budgets). As discussed

above, the evidence also shows that Chairs and Directors are responsible for hiring and firing adjuncts. *See* Tr. 467-533 (testimony of Barbara Bilotta); ER. 94-114.

And yet again, petitioner's witnesses confirmed on cross-examination that Chairs and Directors indeed exercise such managerial responsibilities. Regarding the relationship of Directors to Chairs, Susan Steffan echoed Dr. Macur's testimony that Chairs and Directors perform managerial duties by testifying that Directors "are the first line in the chain of command." Tr. 1025. Ms. Steffan also confirmed that Chairs and Directors are responsible preparing and administering the department and program budgets. Tr. 1057-69. Likewise, Petitioner's witness Helen Lynn Horne-Moyer testified on cross-examination that as Chair she holds monthly meetings, creates the department schedule and selects faculty members to fill course assignment which the VPAA always approves, and that she as Chair and the Directors in her department are responsible for preparing and administering the department and program budgets. Tr. 1336-44, 1347, 1368-71, 1373-74. And petitioner's witness Alice Villasenor testified that as a Director she was responsible for scheduling courses. Tr. 1494.

POINT IV

THE LIBRARY DIRECTOR IS BOTH A MANAGER AND A SUPERVISOR

The Library Director is the chief academic librarian for the College and is responsible for the operation of Medaille's libraries and the hiring, firing and supervision of the Profession Librarians. *See* ER. 562, pp. 6-7. Accordingly, the Library Director, like the Chairs and Directors, are both managers and supervisors under the Act. It is uncontested by the petitioner that the Library Director, among other duties, administers the library programs, effectively hires and fires library employees and staff, evaluates the library staff

and thereby affects the staff's employment status, prepares an annual library budget and is generally responsible for the overall management of the libraries. Tr. 156-58; ER. 33 (accepted hiring recommendation submitted by the Library Director); ER. 121 and 126 (performance evaluations conducted by Library Director).

POINT V

ANY ARGUMENTS BY PETITIONER RELATED TO THE SUSPENSION OF THE 2018 FACULTY HANDBOOK ARE WITHOUT MERIT

Medaille anticipates that the petitioner will argue in support of its position something along the lines that because Medaille suspended its prior Faculty Handbook issued in October 2018 without the faculty's approval and the faculty has not approved the new Faculty Handbook adopted by Medaille in July 2020, that shared governance no longer exists at Medaille and that as a result the faculty are not managerial employees. Such an argument is without merit. It not only misconstrues the source of the faculty's shared governance managerial authority but also ignores reality.

There is no question that the faculty's involvement in shared governance at Medaille has continued uninterrupted from the suspension of the October 2018 Faculty Handbook to the present in the same manner and to the same extent as it existed prior to the suspension. Dr. Macur testified that the shared governance provisions that existed in the October 2018 Handbook were carried over into what is now Appendix 4.8 to the July 2020 Handbook and that the language in Appendix 4.8 is substantially the same as that approved by the faculty in the October 2018 Handbook. Tr. 124-30; ER. 7 and 562. In other words, the shared governance provisions have simply been moved from the body of the October 2018 Handbook to Appendix 4.8 of the July 2020 Handbook. Although there was an approximately three-month period during which Medaille was without a Faculty

Handbook, Dr. Macur testified that during that time Medaille continued to recognize and operate under the shared governance provisions. Tr. 740-41. And Dr. Macur reaffirmed the faculty's continued involvement in the shared governance of Medaille's management in a memorandum sent to all faculty on October 21, 2020. ER. 561.⁶

The petitioner's witnesses confirmed under cross examination that shared governance has continued without interruption since the suspension of the October 2018 Handbook. Susan Steffan testified that when the 2018 Handbook was suspended the VPAA informed the UCC and GPC to continue to follow the policies and procedures in the 2018 Handbook and that those committees continued to do so. Tr. 957-60. She also testified that Medaille never told the faculty or any of its committees to stop doing so. Tr. 969-70. She further testified that the Faculty Assembly met at the start of the current academic year, after the suspension of the 2018 Handbook, and elected and appointed faculty members to all faculty committees. Tr. 911-14. And petitioner's witness Helen Lynn Horne-Moyer testified that the GPC met just last month in October 2020 and voted on curriculum changes. Tr. 1391-93. A review of the recommendations of the UCC and GPC also shows that those committees continued to make recommendations for curriculum changes after the suspension of the 2018 Handbook in April 2020. *See, e.g.*, ER. 318-334 (UCC action taken on June 20, 2020); ER. 376, 378, 379, 380, 381, 383, 385, 390-92 (UCC action taken on

⁶ Petitioner objected to this document at the hearing on the grounds that it was prepared after the filing of the petition. However, that it was prepared after the filing of the petition does not diminish its relevance or the weight it should be given. Dr. Macur's October 21st memo is not a change in position taken after the fact. Rather, it merely reaffirms the position Medaille announced to the faculty when the October 2018 Handbook was suspended and which petitioner's own witnesses confirmed they were aware of.

June 23, 2020). And not only did the faculty continue its shared governance responsibilities after the October 2018 Handbook was suspended, but as petitioner's witnesses Susan Steffan and Helen Lynn Horne-Moyer testified, faculty Chairs and Directors have continued to perform their supervisory and managerial duties in those roles.

In addition to ignoring the reality that the faculty's involvement in shared governance has continued unabated, the petitioner's argument based on the suspension of the October 2018 Handbook fundamentally misconstrues the source of the faculty's authority in the shared governance of Medaille. By arguing that the July 2020 Faculty Handbook and its accompanying Appendix 4.8 (ER. 562) are invalid because the faculty have not approved the July 2020 Handbook, the petitioner is making a contractual argument - the faculty has not expressly agreed to the July 2020 Handbook and Appendix 4.8 and, therefore, the faculty no longer have any shared governance authority.

But the issue before the Board is not whether some type of contract between Medaille and its faculty or even if the faculty approved of the July 2020 Handbook and Appendix 4.8. Rather, the issue is whether Medaille has conferred upon the faculty managerial authority and whether the faculty in fact exercise it. The conferral of that authority and the faculty's exercise of it does not require any written documents or the faculty's express consent. All that is required is sufficient evidence to establish that as a matter of practice Medaille's faculty exercise managerial authority. As discussed above, the evidence shows overwhelmingly that the faculty in fact does so.

IV. CONCLUSION

The petition for an election should be dismissed in its entirety because Medaille's full-time faculty are managers under the Act because they effectively control Medaille's

academic programs, academic policies and personnel policies and decisions. If the petition is not dismissed in its entirety, Medaille's Chairs and Directors and its Library Director should nonetheless be excluded from the proposed bargaining unit because they are both managers and supervisors under the Act because of the nature of their job duties and responsibilities.

Dated: November 12, 2020
Buffalo, New York

Respectfully submitted,

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